Pilar C. French, OSB No. 962880
frenchp@lanepowell.com
Mary Jo Heston, OSB No. 030438
hestonm@lanepowell.com
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, Oregon 97204-3158
Telephone: 503.778.2100
Facsimile: 503.778.2200

Attorneys for Defendant Wachovia Mortgage FSB

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re George Tran, Debtor.	Case No. 10-64979-fra-13
George Tran, Plaintiff, v. Wachovia Mortgage FSB, a division of Wells Fargo Bank, N.A., as successor by merger, Defendant.	Adversary No. 10-06210-fra Defendant Wachovia Mortgage FSB's MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

On or about March 5, 2010, plaintiff filed three lawsuits styled, *Tran v. Wachovia Mortgage,* Lane County Circuit Court Case No 1210-05251, *Tran v. Wachovia Mortgage,* Lane County Circuit Court Case No 1210-05252 and *Tran v. Wachovia Mortgage,* Lane County Circuit Court Case No 1210-05253 (collectively "the Lane County Cases") in an apparent effort

to avoid having to repay a total of $528,500.00 that he borrowed, enjoyed, and promised to repay, and further, to prevent defendant Wachovia Mortgage FSB[1] ("Wachovia") from exercising its lawful, contractual rights to foreclose on the three trust deeds that plaintiff gave in exchange for three separate loans totaling the aforementioned amount.

Plaintiff apparently contends that he does not need to repay the money he borrowed, and that Wachovia may not foreclose upon the trust deeds at issue. In support of that contention, plaintiff claims that Wachovia purportedly failed to respond to two qualified written requests ("QWRs") in which plaintiff demanded to inspect the original promissory notes he signed, ostensibly in violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §2605(e), various provisions of Utah's Uniform Commercial Code, and the Truth In Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* Plaintiff also contends that Wachovia "lacks standing" to collect or foreclose on the trust deeds.

On September 23, 2010, Wachovia removed the Lane County Cases to this Court after plaintiff filed a Chapter 13 Bankruptcy Petition. For the reasons explained more fully below, this Court should dismiss each of plaintiff's adversary proceedings with prejudice for failure to state a claim upon which relief may be granted:

1. Plaintiff has failed to state a claim for violation of RESPA for multiple reasons. *First,* contrary to plaintiff's contentions, the letters plaintiff sent to Wachovia and Wachovia's foreclosure counsel are not QWRs within the meaning of the RESPA. To be a QWR, a borrower's written inquiry must relate to "servicing," as that term is defined by RESPA. Here, plaintiff's letters, which are attached to his complaint, definitively establish that he did not make an inquiry relating to servicing, but instead demanded proof of ownership. *Second,* plaintiff has failed to allege facts to establish other essential elements of a RESPA claim. He has not alleged

[1] Wachovia Mortgage FSB is incorrectly named in the caption. Wachovia is now a division of Wells Fargo Bank, N.A. Wells Fargo Bank is Wachovia Mortgage FSB's successor-in-interest by merger.

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

facts showing that the loans at issue are covered by RESPA; loans made for commercial purposes are exempt from RESPA. He has not alleged he sent the purported QWRs to the address designated by the servicer, that Wachovia is the servicer, or that he has even suffered actual damages. Indeed, the letter plaintiff sent to foreclosure counsel most certainly is not a QWR since foreclosure counsel is not a servicer. Nor has plaintiff alleged any facts to explain why the responses he received were inadequate. The failure to plead facts to support all of those required elements is fatal to plaintiff's RESPA claim.

2. Plaintiff has not stated a claim for relief under the Uniform Commercial Code ("UCC"). The UCC is irrelevant to this case. Wachovia has not sued plaintiff to enforce the note. Instead, it has sought to recover the amounts owing on the loans through the non-judicial foreclosure process to which plaintiff agreed. Contrary to plaintiff's belief, Wachovia is not legally required to present the original note before it may proceed with its non-judicial foreclosure rights and remedies under the trust deed and Utah law.

3. Plaintiff has not stated a claim for violation of the TILA. Without citing any statutory authority, plaintiff baldly asserts that TILA required Wachovia to respond to his letters on a point by point basis. Insofar as Wachovia is aware, TILA does not require Wachovia to do as plaintiff contends. The Court should dismiss the claim in any event. As with plaintiff's other claims, his allegations fall far below the facial plausibility standard to state a claim for violation of TILA.

4. Plaintiff last contends that Wachovia lacks standing to enforce the trust deed. Plaintiff's allegations are belied by the trust deed and other loan documents. Those documents confirm that Wachovia, its successors and assigns may exercise their rights and remedies under the trust deed, including non-judicial foreclosure.

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

II. STATEMENT OF FACTS[2]

On or about May 1, 2008, plaintiff borrowed $210,000 from Wachovia ("Loan #7772"). (French Decl. Ex. 1 at 15; Ex. 2 at 7.) In exchange for the proceeds, plaintiff promised to repay the debt through biweekly payments. (Ex. 2 at 2.) He further agreed to sign an adjustable rate note and give a trust deed in the property commonly known as 1430 E. 2500 N, Layton, Utah ("the Property"). (*Id.* Ex. 1 at 2; Ex. 2 at 1 and 7.) Plaintiff agreed that if he failed to repay the loan amount in accordance with the terms and conditions of the parties' agreement, Wachovia could recover the amount owing through non-judicial foreclosure of the trust deed. (*Id.* Ex. 1 at 13.) Plaintiff subsequently defaulted on his repayment obligations resulting in the commencement of non-judicial foreclosure proceedings. (*Id.* Exs. 3 and 4.)

On or about March 5, 2010, plaintiff claims that he sent a letter to Wachovia in which he advised that he would resume making payments on Loan 7772, and if Wachovia provided him an opportunity to inspect the "**ORIGINAL WET INK SIGNATURE PROMISSORY NOTE**[.]" (Plaintiff's Complaint Ex. A at 2.)

When Wachovia purportedly failed to respond to plaintiff's demand, he sent another letter, this time to Wachovia foreclosure attorneys. (Plaintiffs' Complaint Ex. B.) When neither Wachovia nor its attorneys responded to plaintiff's satisfaction, plaintiff filed a "Notice of Default" in the Davis County Recorder's Office in which he represented that Wachovia was no longer entitled to its trust deed in the Property for Loan 7772. (Plaintiff's Complaint Ex. C.)

Plaintiff thereafter filed the Lane County Cases relating to Loan 7772, and the two others with Wachovia. And when plaintiff filed a Chapter 13 bankruptcy petition, Wachovia removed all these matters to this Court.

[2] Wachovia states the facts in the light most favorable to plaintiff solely for purposes of this motion and in accordance with its request for the Court to take judicial notice of or incorporate by reference the documents attached to the Declaration of Pilar C. French filed herewith.

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

III. ARGUMENT

A. Plaintiffs' Complaint Fails to State a Claim Upon Which Relief Can Be Granted.

A complaint must be dismissed when it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Generally, a complaint can survive a motion to dismiss if it meets the minimal pleading requirements of Rule 8(a)(2). *Swartz v. KPMG LLP,* 476 F.3d 756, 764 (9th Cir. 2007). As explained in *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009):

> [T]he pleading standard [under Fed. R. Civ. P. 8] 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 assertion[s]" devoid of "further factual enhancement."

Iqbal, 129 S. Ct. at 1949 (internal citations omitted).

Instead, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* (citing *Twombly*, 550 U.S. at 556). In *Iqbal*, the court reasoned that 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." *Id.* 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.'" *Id.* (citing *Twombly*, 550 U.S. at 557).

The Supreme Court outlined two "working principles" for applying the *Twombly* standard in the motion to dismiss context: (1) "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and (2) "only a complaint that states a plausible claim for relief survives a motion to

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

dismiss." *Id.* at 1949-50 (citing *Twombly*, 550 U.S. at 555-56). The Court noted that the determination of whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense, "[b]ut 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 1950 (citing Fed. R. Civ. P. 8(a)(2)). As additional guidance in applying these principles, the Court stated:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When 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.

Id.

In evaluating a motion to dismiss, the court must construe plaintiff's complaint in the light most favorable to the plaintiff and accept all well-pleaded allegations as true. *Shwarz v. U.S.,* 234 F.3d 428, 435 (9th Cir. 2000). The court need not accept as true, however, allegations that contradict facts that may be judicially noticed or incorporated by reference. When a plaintiff fails to introduce a pertinent document as part of his pleading, the defendant may do so as part of its motion to dismiss. *Branch v. Tunnell,* 14 F.3d 449, 453-54 (9th Cir. 1994), *overruled on other grounds, Galbraith v. County of Santa Clara,* 307 F.3d 1119 (9th Cir. 2002). Such documents are not considered to be outside the pleadings. *Id.; accord In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996) (this Court may take judicial notice of "documents whose contents are alleged in a complaint and whose authenticity no party questions[.]" (quoting *Fecht v. The Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995)); *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) ("Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

forms the basis of the plaintiff's claim"). This Court also may take judicial notice of documents that are matters of public record without converting a motion to dismiss into a motion for summary judgment. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (holding district court, when determining whether complaint fails to state a claim, may take "judicial notice of matters of public record outside the pleadings[.]"). Here, Wachovia has requested the Court to take judicial notice of or incorporate by reference several documents referred to in plaintiff's complaint, as well as documents of public record. (*See* Wachovia's Request for Judicial Notice.)

Application of these pleading standards necessitates dismissal of plaintiff's complaint. As in *Iqbal*, plaintiff's complaint has not "nudged" his claim "across the line from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1951 (citing *Twombly*, 550 U.S. at 570).

B. Plaintiff Has Failed to State a Claim for Violation of RESPA.

Plaintiff's complaint is difficult to decipher, but he appears to be asserting a claim for violation of RESPA. Contrary to plaintiff's belief, his complaint fails to state a claim for violation of RESPA for multiple reasons, several of which by themselves justify dismissal with prejudice.

1. Plaintiff has not pleaded, and cannot plead, requisite threshold facts establishing that Loan 7772 is subject to RESPA. Not every loan is subject to RESPA. 12 U.S.C. § 2606 exempts credit transactions "involving extensions of credit—(1) primarily for business [or] commercial * * * purposes." Plaintiff has not alleged any facts to establish with facial plausibility that Loan 7772 was for purposes other than business or commercial purposes. Indeed, it does not appear that Loan 7772 secures plaintiff's primary residence. According to plaintiff's pleadings and the adjustable rate note, he resides in Eugene, Oregon. (*See* French Decl. Ex. 2 at 5.)

2. Plaintiff's letters are not QWRs. Plaintiff's complaint is also deficient, because his letters are not QWRs. 12 U.S.C. § 2605(e)(1)(B) defines "QWR" as follows:

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

> [A] qualified written request shall be 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).

Not every written inquiry to a servicer by a borrower is a QWR within the meaning of § 2605(e). A QWR must relate to the servicing of the loan. 12 U.S.C. § 2605(e)(1)(A) ("If any servicer * * * receives a qualified written request * * * for information relating to the servicing of such loan," it must respond"). *See also Lucero v. Diversified Investments Inc.,* 2010 WL 3463607 *1, *4 (S.D. Cal. Aug. 31, 2010) (QWRs are requests relating to servicing "like the outstanding amount due or interest rate"); *Lopez v. U.S. Bank National Association,* 2010 WL 3463622 *1 (S.D. Cal. Aug. 31, 2010) (noting that QWRs are requests relating to servicing, "like the outstanding amount due or interest rate" or "for purposes of challenging an amount due or try to correct an error by the loan servicer"); *Thayne v. Taylor, Bean & Whitaker Mortgage Corporation,* 2010 WL 3546929 *3 (D. Utah Sept. 10, 2010) (QWRs relate only to the servicing of the loan).

For purposes of RESPA, "servicing" is specifically defined. "Servicing" means "receiving any scheduled period payments from a borrower pursuant to the terms of any loan * * * 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." 12 U.S.C. § 2605(i)(3). Thus, a written inquiry that does not relate to servicing is not a QWR.

Here, plaintiff's letters are not QWRs. They do not seek information relating to servicing but rather, are demands to review the original promissory note so that plaintiff could contest the impending non-judicial foreclosure. Oregon's courts apparently have not addressed the question

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

of when and under what circumstances a written borrower inquiry constitutes a QWR within the meaning of RESPA but courts from other jurisdictions including Utah have. Those courts have consistently held that written communications designed to elicit information in order to refute the validity of the loan, rather than some aspect of its servicing, are not QWRs. *See, e.g.*, *King v. American Mortgage Network, Inc.,* 2010 WL 3516475, *2 (D. Utah Sept. 2, 2010) (where plaintiff's letter did not allege any error or request for information about servicing of the loan, it was not a QWR; instead, plaintiff's letter "was an accusation of unlawful conduct, a demand to produce loan documents for inspection, and a threat of legal action, which contained no reference to servicing of the Loan"); *Imada v. Onewest Bank, FSB*, 2010 WL 2985228, 2 (E.D. Cal. July 27, 2010) (plaintiff did not submit a QWR where he demanded servicer to produce "information sufficient to identify the [Special Purpose Vehicle] and certificate holders"); *Morris v. Bank of America,* 2010 WL 761318, *6 (N.D. Cal. March 3, 2010) (plaintiff did not send a QWR where his correspondence claimed that loan was defective and demanded rescission); *Keen v. American Home Mtg. Servicing, Inc.*, 664 F. Supp. 2d 1086, 1096-97 (E.D. Cal. Oct. 21, 2009) (borrower letter demanding to rescind the loan and cancel the trustee's foreclosure sale was not a QWR because the letter disputed the validity of the loan and did not concern servicing); *Consumer Solutions REO, LLC v. Hillery*, 658 F. Supp. 2d 1002, 1013-14 (N.D. Cal. 2009) (dismissing borrower's RESPA QWR claim where inquiry sought information pertaining to the validity of the loan, rather than its servicing); *MorEquity, Inc. v. Naeem*, 118 F. Supp. 2d 885, 900-01 (N.D. Ill. Oct. 25, 2000) (holding that a borrower's communication alleging a forged deed and irregularities with respect to the recording of the loans did not relate to loan servicing and therefore did not constitute a QWR under RESPA).

Simply put, as the case law cited above holds, plaintiff's letters go to the ownership of the loan, not its servicing (e.g., receiving and applying payments) and as such, they are not a QWR within the meaning of § 2605(e).

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

3. Plaintiff failed to plead facts to establish that Wachovia is the servicer. Plaintiff's RESPA claim also fails because he does not allege that Wachovia fits the statutory definition of "servicer." *See Moon v. Countrywide Home Loans, Inc.*, 3:09-CV-00298-ECR-VPC, 2010 U.S. Dist. LEXIS 11281, at *12-13 (D. Nev. Feb. 9, 2010) (plaintiff failed to state a claim upon which relief could be granted under RESPA because the complaint was void of factual allegations that defendant was the servicer of his loan, as that term is defined under RESPA). A "servicer" is defined under RESPA as "the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan)." 12 U.S.C. § 2605(i)(2). Plaintiff does not even allege that Wachovia (or its foreclosure counsel) is responsible for servicing Loan 7772. It almost goes without saying that plaintiff's second letter at Exhibit B is not a QWR, since he admits he sent it to foreclosure counsel who obviously is not the servicer. (Plaintiff's Complaint Exhibit B.)

4. Plaintiff failed to plead that he sent his alleged QWRs to the address specified by the servicer for receipt of such correspondence. Plaintiff's claim fails for an additional reason. Federal regulations implementing RESPA permit a servicer, in its notice letter to the borrower, to set forth "a separate address where the qualified written requests must be sent." 24 C.F.R. § 3500.21(d)(3)(ii); *see also* 24 C.F.R. § 35.000.21(e)(1) ("By notice either included in the Notice of Transfer or separately delivered by first-class mail, postage prepaid, a servicer may establish a separate and exclusive office and address for the receipt and handling of qualified written requests"); *Bishop v. Quicken Loans, Inc.,* 2010 WL 3522128, *6 (S.D. W. Va. Sept. 10, 2010) (plaintiff must allege that he sent the alleged QWR to the place designated by the servicer).

Plaintiff's complaint is devoid of any allegations that he sent his purported QWRs to the address designated by the servicer for its receipt and handling. Indeed, plaintiff's complaint confirms that the second letter he sent is not a QWR, because he admits that he sent that letter to Wachovia's foreclosure attorneys, not Wachovia. (Plaintiff's Complaint Exhibit B.) *Griffin v.*

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

Citifinancial Mortgage Co., 2006 WL 226106, 6-7 (M.D. Pa. 2006) (servicer has no duty to respond to request sent to servicer's counsel).

5. Plaintiff fails to plead facts to establish that the responses to his letters were deficient. Plaintiff also fails to allege sufficient facts to establish that the responses to the purported QWR were inadequate. In responding to a QWR, "[t]he servicer must only respond with (1) reasons why the account is correct or (2) reasons why the information requested is unavailable." *Gonzalez v. EJ Mortgage, Inc.*, 2010 WL 1996609, *4 (S.D. Cal. May 17, 2010). In *Gonzalez,* after noting that plaintiff's request far exceeded the scope of § 2605(e), the court dismissed plaintiff's claim because he failed to allege that the servicer "did not give reasons why the account is correct, why the information is unavailable, and contact information for someone who can assists the borrower." *Id.*

As in *Gonzalez,* plaintiff's complaint is equally deficient. Plaintiff admits that Wachovia and its attorneys responded, but does not attach the responses to his complaint. (Plaintiff's Complaint at 1.) Plaintiff merely alleges that the responses were deficient because Wachovia and its attorneys only provided him with a copy of the trust deed that he signed. Without further factual allegations, plaintiff's allegations are conclusory and do not properly establish that the responses were deficient.

6. Plaintiff has failed to plead, and cannot plead, sufficient facts to establish that he has suffered actual damages. At a minimum, plaintiff must allege sufficient facts to establish that the purported RESPA violation resulted in actual damages. Plaintiff has not done so. 12 U.S.C. § 2605(f)(1)(A) ("Whoever fails to comply with any provision of this section shall be liable to the borrower for * * * any actual damages to the borrower as a result of the failure * * *."); *see also Thayne,* 2010 WL 3546929 at *3 (dismissing complaint where plaintiff failed to plead sufficient facts that he suffered actual damages as a result of the servicer's alleged failure to comply with RESPA); *Bishop*, 2010 WL 3522128 at *6 (finding plaintiffs' conclusory allegations that they suffered "financial loss, annoyance and inconvenience" insufficient to plead

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

"actual damages"); *Copeland v. Lehman Brothers Bank, FSB,* 2010 WL 2817173, *3-4 (S.D. Cal. July 15, 2010) (holding that § 2605 requires a showing of pecuniary damages to state a claim); *Lucero*, 2010 WL 3463607 at *4 (plaintiff must suffer actual damages in order to recover under section 2605(e)); *Durland v. Fieldstone Mortgage Co.*, 2010 WL 3489324, *4 (S.D. Cal. Sept. 3, 2010) (court dismissed plaintiff's RESPA complaint after determining that plaintiff failed to allege specific facts to support how defendant's alleged failure to respond to plaintiff's QWRs resulted in pecuniary damages); *Hutchinson v. Delaware Savings Bank FSB*, 410 F. Supp. 2d 374, 383 (D. N.J. Jan. 25, 2006) ("Plaintiffs must, at a minimum, also allege that the breach resulted in actual damages.").

Plaintiff cannot cure the deficiency in his complaint by amendment. Since the properties that are subject to foreclosure are located in Utah, Utah law controls. Like Oregon and many other states, Utah has developed a statutory scheme governing trust deeds and non-judicial foreclosures. *See generally* Utah Code § 57-1-19 *et seq*. The power of sale is conferred by Section 57-1-23. A qualified trustee may sell the property via non-judicial foreclosure so long as the following prerequisites occur:

> (1) the trustee must record a proper notice of default;
>
> (2) three months must pass from the time the notice of default is filed before the sale occurs; and,
>
> (3) after the three months pass, the trustee must give proper notice of the sale before it occurs.

Utah Code § 57-1-24.

Insofar as Wachovia is aware, Utah's statutes governing non-judicial foreclosures are devoid of any obligation requiring presentment of the note before proceeding with non-judicial foreclosure on the trust deed.

Utah's courts apparently have not addressed the precise question here—whether a beneficiary must present the original promissory note prior to exercising its non-judicial

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

foreclosure remedies. Other jurisdictions in non-judicial foreclosure states have addressed this question, however, and have uniformly held that a beneficiary need not present the original note prior to proceeding with a non-judicial foreclosure. *Stewart v. Mortgage Electronic Registration Systems, Inc.,* 2010 WL 1055131, 12 (D. Or. Feb. 9, 2010) (holding that the Oregon Trust Deed Act, ORS 86.705 *et seq.* does not require presentment of the note or any other proof of "real party in interest" or "standing," other than the Deed of Trust); *Gallegos v. Quantum Servicing Corp.,* 2010 WL 2464831, 2 (S.D. Cal. June 14, 2010) (holding that "no party needs to physically possess the promissory note" prior to proceeding with a non-judicial foreclosure under California's comprehensive framework for non-judicial foreclosures); *Croce v. Trinity Mortgage Assurance Corporation,* 2009 WL 3172119, 5 (D. Nev. Sept. 28, 2009) (holding that Nevada's statutory scheme does not require presentment of the note before trustee may exercise its power of sale); *Stanton v. Federal National Mortgage Association,* 2010 WL 707346, 3-4 (W.D. Mich. Feb. 23, 2010) (holding that neither Michigan's foreclosure by advertisement statute nor the UCC requires presentment of the note prior to sale).

Because Wachovia was not required to produce the original note in order to proceed to foreclosure, plaintiff simply cannot establish that he suffered actual damages as a result of Wachovia's alleged refusal to produce the original note for inspection, as demanded by plaintiff. *See Rodeback v. Utah Financial,* 2010 WL 2757243, *3 (D. Utah July 13, 2010) (rejecting plaintiffs' claim that the foreclosure, notice of default, current lawsuit, and mental anguish constitute "actual damages" where servicer purportedly failed to respond to borrower's alleged QWR requesting, among other things, proof of ownership of loan and name of prior servicer); *Martinez v. America's Wholesale Lender,* 2010 WL 934617, *6 (N.D. Cal. March 15, 2010) (plaintiff did not establish that she suffered actual damages due to servicer's failure to respond to her alleged QWR in which she demanded proof of standing to foreclose and chain of title). Accordingly, plaintiff's RESPA claim fails as a matter of law.

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

C. Plaintiff Has Failed to State a Claim for Violation of the "UCC."

Plaintiff mistakenly believes that Wachovia must prove upon plaintiff's demand that it is still the holder of the note under Utah Code § 70A-3-305 (Utah's version of UCC 3-305). Plaintiff is incorrect. That statute merely provides that in "an action to enforce the obligation of a party" to pay the *note,* "[a]n obligor is not obliged to pay the instrument if the person seeking enforcement of [note] does not have rights of a holder in due course and the obligor proves that the instrument is lost or stolen." Utah Code § 70A-3-305(3). Here, Wachovia has not sued to enforce the adjustable rate note. Instead, it is merely seeking to exercise its *non-judicial* foreclosure remedies under the trust deed. As explained previously, Utah's comprehensive non-judicial foreclosure procedures do not require presentment of the note before the beneficiary under a trust deed may exercise its right to non-judicial foreclosure.

Although Utah's courts have not addressed this issue, other courts have, and have repeatedly determined that the UCC does not require a lender to present the original note, before proceeding with foreclosure. *Charov v. Bank of America,* 2010 WL 2629419, 1 (D. Ariz. June 30, 2010) (noting that District of Arizona has repeatedly rejected challenges to Arizona's non-judicial foreclosure proceedings based on the UCC and the failure to present a note) (citing *Levine v. Downey Sav. & Loan F.A.,* 2009 WL 4282471, 3 (D. Ariz. Nov. 25, 2009); *Diessner v. Mortgage Electronic Registration Systems, Inc.,* 618 F. Supp. 2d 1184, 1187-88 (D. Ariz. 2009); *Mansour v. Cal-Western Reconveyance Corp.,* 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009)*; Wallis v. Indymac Federal Bank,* 2010 WL 2342530, 5 (W.D. Wash. June 8, 2010) (rejecting plaintiff's "show me the note defense" to avoid foreclosure) (citing *Freeston v. Bishop, White & Marshall, PS,* 2010 WL 1186276 (W.D. Wash. 2010)); *Stewart,* 2010 WL 1055131 at 10 (rejecting UCC as immaterial, foreclosure of trust deeds are governed by Oregon's Trust Deed Act); *Stanton,* 2010 WL 707346 at 3-4 (W.D. Mich. 2010) (holding that neither Michigan's foreclosure by advertisement statute nor the UCC requires presentment of the note prior to sale).

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

D. Plaintiff Has Failed to State a Claim for Violation of TILA.

Without citation to any legal authority, plaintiff claims that Wachovia was required to respond to plaintiff's letters "point by point." (Plaintiff's Complaint at 2 and 5.) Wachovia is aware of no such provision under TILA. In any event, if what plaintiff purports to assert is a TILA claim, the claim must be dismissed for failure to plead sufficient facts to meet the facial plausibility standard set forth under *Twombly* and *Iqbal.*

E. Wachovia Has Standing to Foreclose.

Plaintiff also argues that Wachovia lacks standing to proceed with the foreclosure. (Plaintiff's Complaint at 4.) Plaintiff's argument lacks merit. The Deed of Trust and the Adjustable Rate Note both identify the lender as Wachovia Mortgage FSB, and its "successors and/or assignees." (French Decl. Ex. 1 at 1; Ex. 2 at 1.) The Substitution of Trustee is executed by Wells Fargo Bank, NA as successor by merger to Wells Fargo Bank Southwest, N.A. f.k.n. as Wachovia Mortgage FSB, Beneficiary. (French Decl. Ex. 3.) Unlike many other cases of this kind, in this case, the loan has not even been sold or assigned, but remains in the hands of the original lender, Wachovia, which has since merged with, and is now a division of, Wells Fargo Bank, N.A.

IV. CONCLUSION

For the foregoing reasons, plaintiff's adversary proceeding should be dismissed with prejudice and the Court should grant Wachovia and its agent relief from stay in order to proceed to foreclosure.

DATED: September 30, 2010

LANE POWELL PC

By /s/ Pilar C. French
Pilar C. French, OSB No. 962880
Mary Jo Heston, OSB No. 030438
Attorneys for Defendant, Wachovia Mortgage FSB

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2010, I caused to be served a copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS on the following person(s) in the manner indicated below at the following address(es):

- Fred Long: longeugctmail@qwestoffice.net
- US Trustee, Eugene: USTPRegion18.EG.ECF@usdoj.gov

☒ by **CM/ECF**
☐ by **Electronic Mail**
☐ by **Facsimile Transmission**
☐ by **First Class Mail**
☐ by **Hand Delivery**
☐ by **Overnight Delivery**

George Tran
645 W 18th Avenue
Eugene, OR 97402-4026

☐ by **CM/ECF**
☐ by **Electronic Mail**
☐ by **Facsimile Transmission**
☒ by **First Class Mail**
☐ by **Hand Delivery**
☐ by **Overnight Delivery**

/s/ Pilar C. French
Pilar C. French

709411.0002/877553.1

LANE POWELL PC
601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200