UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61856-CIV-DIMITROULEAS

JENNIFER SANDOVAL,

Plaintiff,

vs.

RONALD R. WOLFE & ASSOCIATES, P.L.,
SUNTRUST MORTGAGE, INC., and
NATIONSTAR MORTGAGE, LLC,

Defendants.
_____/

ORDER GRANTING DEFENDANT SUNTRUST'S MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendant SunTrust Mortgage, Inc.'s Motion to Dismiss [DE 38] (the "Motion"), filed on October 19, 2016. The Court has carefully considered the Motion, Plaintiff Jennifer Sandoval's Response [DE 50], SunTrust's Reply [DE 55], the arguments by counsel at the January 10, 2017 hearing, and is otherwise fully advised in the premises. For the reasons stated herein, the Court will grant the Motion.

I. BACKGROUND

Plaintiff Jennifer Sandoval ("Sandoval" or "Plaintiff") filed her Complaint [DE 1] on August 3, 2016, which she replaced on September 15, 2016 with an Amended Class Action Complaint (the "Amended Complaint").[1] Defendants are Suntrust Mortgage, Inc. ("Suntrust") and Ronald R. Wolfe & Associates, P.L. ("Wolfe").

[1] Plaintiff amended her Amended Complaint by interlineation on November 16, 2016. *See* [DE's 43-48].

The Amended Complaint alleges the following three Counts: Count I for alleged violation of the Real Estate Settlement Procedures Act, 12 U.S.C. §2605(k) ("RESPA") against Suntrust, Count II for alleged violation the Florida Consumer Collection Practices Act ("FCCPA"), §559.72(9), Fla. Stat. against both Defendants, and Count III for alleged violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§1692e, 1692f against both Defendants.

According to the allegations of the Amended Complaint, SunTrust is a mortgage loan servicer and owner. [DE 23] at ¶ 1. Wolfe acts as a third party debt collector for SunTrust in collecting mortgage payments and fees. ¶ 1. On or around April 25, 2007, Plaintiff purchased a home in Florida through a loan from SunTrust, secured by a mortgage on the property. ¶ 36. SunTrust later entered into a Loan Modification Agreement with Plaintiff on April 27, 2010, which supplemented the original Mortgage Agreement. ¶ 36. SunTrust assigned the Plaintiff's Mortgage Agreement and Note to Nationstar Mortgage, LLC ("Nationstar") on December 6, 2010, which became the servicer and owner of Plaintiff's mortgage loan. ¶ 37. Plaintiff made continuous payments on her mortgage but fell behind and allegedly defaulted sometime on or before January 1, 2013. ¶ 38.

Wolfe was hired to initiate a foreclosure lawsuit against Plaintiff. ¶ 39. After the foreclosure lawsuit was filed and Plaintiff allegedly defaulted, Nationstar assigned the Plaintiff's Mortgage Agreement and Note back to Suntrust on September 26, 2013. ¶ 40. Suntrust began servicing the Plaintiff's mortgage loan after it was in default, and since September 26, 2013, Suntrust has been the servicer and owner of the Plaintiff's Mortgage Agreement and Note. ¶ 41. SunTrust substituted itself for Nationstar as the plaintiff in the foreclosure lawsuit brought against Plaintiff on February 13, 2014. ¶ 42.

On or about August 24, 2014, Plaintiff retained and paid a retainer to the law firm Van Horn Law Group, P.A. to defend her in the foreclosure lawsuit brought by Suntrust. ¶ 43. In or about July 2015, Plaintiff, through counsel, mailed SunTrust a request for information. ¶ 44. On August 3, 2015, SunTrust responded to Plaintiff's request for information and sent, through Wolfe, a reinstatement letter in which Suntrust advised Plaintiff that if she wished to avoid foreclosure, she must comply with the requirements for reinstatement of her loan. ¶ 47. Wolf, acting as a debt collector for SunTrust, charged Plaintiff "estimated amounts" and excessive amounts for third-party services to reinstate her mortgage and avoid foreclosure. ¶¶ 1; 49-59. Specifically, Plaintiff alleges that Defendants sought and collected unlawful estimated attorney's fees ($250 for a Motion to Dismiss that had not yet been filed that would be necessary to dismiss the foreclosure suit) and service of process fees ($1,094 - allegedly $360 per person served) from Plaintiff, in violation of RESPA, the FDCPA, and the FCCPA.

Defendant Suntrust moves to dismiss each of these three claims against it, or, alternatively, to strike the Amended Complaint.

II. LEGAL STANDARD

To adequately plead a claim for relief, Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a motion to dismiss should be granted only if the plaintiff is unable to articulate "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). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). When determining whether a claim has facial plausibility, "a court must view a complaint in the

light most favorable to the plaintiff and accept all of the plaintiff's well-pleaded facts as true." *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007).

However, the court need not take allegations as true if they are merely "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949. "Mere labels and conclusions or a formulaic recitation of the elements of a cause of action will not do, and a plaintiff cannot rely on naked assertions devoid of further factual enhancement." *Franklin v. Curry*, 738 F.3d 1246, 1251 (11th Cir. 2013). "[I]f allegations are indeed more conclusory than factual, then the court does not have to assume their truth." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012). In sum, "[t]he plausibility standard 'calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' of the defendant's liability." *Miyahira v. Vitacost.com, Inc.*, 715 F.3d 1257, 1265 (11th Cir. 2013) (quoting *Twombly*, 550 U.S. at 556).

III. DISCUSSION

Suntrust argues that Plaintiff's Amended Complaint must be dismissed because it fails to state a claim upon which relief may be granted against SunTrust. *See* Rules 8, 12(b)(6), Fed. R. Civ. P. Suntrust raises numerous arguments in support of dismissal, several of which establish independent grounds for dismissal of one or more of the three counts. The Court will first discuss the primary basis for the Court's dismissal, failure to allege compliance with a contractual condition precedent, and then address the Court's alternative grounds for dismissal of some or all of the claims, in turn.

A. Failure to allege compliance with a contractual condition precedent

Plaintiff's claims against Suntrust under RESPA (Count I), FCCPA (Count II) and the FDCPA (Count III) are barred and must be dismissed because Plaintiff fails to allege compliance

with a contractual condition precedent.

Paragraph 20 of the subject mortgage requires Plaintiff to give Suntrust notice and a reasonable period of time to take corrective action of any breach of any provision of the mortgage or of any duty owed by reason of the mortgage before commencing a judicial action:

> Neither Borrower [Plaintiff herein] nor Lender [SunTrust] may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

[DE 23-1] at ¶ 20.

Plaintiff fails to allege that she gave Suntrust notice and a reasonable period of time to take corrective action as required by paragraph 20 of the subject mortgage as to the two disputed charges at issue, nor has she represented that she complied. Plaintiff's RESPA, FDCPA, and FCCPA claims in this case are all based upon the disputed $250 fee for a motion to dismiss that would be necessary to resolve the mortgage foreclosure lawsuit and the allegedly excessive service of process charges incurred in the foreclosure lawsuit and reflected in the foreclosure judgment. All of these claims arise out of the mortgage, Plaintiff's efforts to reinstate the mortgage, and Plaintiff seeking information about reinstating the mortgage, as the terms and duties under the mortgage and note are what provide the basis for Suntrust to charge to and recover these fees from Plaintiff. *See Charles v. Deutsche Bank Nat'l Trust Co.*, No. 1:15-CV-21826-KMM, 2016 WL 950968, at *2 (S.D. Fla. Mar. 14, 2016) (dismissing RESPA, TILA, FDCPA, and FCCPA claims based on allegedly inflated property inspection fees because plaintiff failed to comply with the mortgage's pre-suit notice and cure provisions before commencing the action); *Sotomayor v. Deutsche Bank Nat'l Trust Co.*, No. 0:15-CV-61972-

WPD, 2016 WL 3163074, at *2 (S.D. Fla. Feb. 5, 2016) (dismissing plaintiffs' TILA, FDCPA, and FCCPA claims based upon allegedly inflated property inspections fees plaintiffs' failure to give defendants notice and a reasonable period of time to take corrective action in accordance with paragraph 20 of the underlying mortgage contract); *Hill v. Nationstar Mortgage LLC*, 2015 WL 4478061, at *3 (S.D. Fla. July 2, 2015) (holding that, regardless of the cause of actions alleged, the homeowners' claims related to the allegedly inflated property inspection fees were entirely based on their mortgage contracts, and thus they were required to comply with the notice and cure provision); *Giotta v. Ocwen Fin. Corp., No.* 15-CV-00620-BLF, 2016 WL 4447150, at *4 (N.D. Cal. Aug. 24, 2016) (dismissing all of plaintiffs' claims, which arose from inspection charges and broker price opinions allegedly charged to plaintiffs pursuant to the terms of the security instrument, thus "fall[ing] squarely within the ambit of the notice-and-cure provision"). Similarly here, Plaintiff was required to give Suntrust the mandatory notice and opportunity to cure in accordance with paragraph 20 of the underlying mortgage contract at issue *prior to* initiating this lawsuit, which she failed to do. Based on the foregoing, the Court holds that all of Plaintiff's claims in this case are fundamentally deficient because Plaintiff failed to comply with the necessary contractual condition precedent set forth in paragraph 20.

Further, the Court exercises its discretion in not abating the action rather than dismissing it. The summary judgment motion filed in April of 2015 in the state court foreclosure action sought service of process costs of $1,098, and included an affidavit of costs as well as process server invoices. Accordingly, before Plaintiff's counsel requested information in July of 2015 about the amount that Plaintiff must pay to resolve the foreclosure action and reinstate her loan, and before Plaintiff's counsel received the August 3, 2015 Wolfe reinstatement letter, Plaintiff's counsel knew specifically what Defendant was seeking for reimbursement of service of process

charges incurred in the foreclosure lawsuit. Plaintiff had ample time to provide notice and an opportunity to cure prior to filing suit in compliance with paragraph 20 without running afoul of the statute of limitations. Lastly, the Court is unconvinced by Plaintiff's position that a party is relieved from its obligation to satisfy a mandatory contractual condition precedent prior to filing a lawsuit based upon that party's subjective belief that the other party would refuse to cure had it been given notice of the grievance and a reasonable period of time to take corrective action.

Pursuant to the foregoing, Plaintiff's claims are dismissed for failure to allege compliance with a contractual condition precedent.

In the alternative, the Court dismisses some or of all of the claims on other independent grounds, as follows:

B. *The Wolfe reinstatement letter complied with RESPA*

Plaintiff's counsel's alleged written request for reinstatement figures constitutes a qualified written request that falls within the scope of RESPA. *See* 12 U.S.C. 2605E(1)(B)(i)&(ii) (defining a qualified written request as "written correspondence" that "enables the servicer to identify, the name and account of the borrower"; and "provides sufficient detail to the servicer regarding other information sought by the borrower"); *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 687 (7th Cir. 2011) ("RESPA does not require any magic language before a servicer must construe a written communication from a borrower as a qualified written request and respond accordingly. The language of the provision is broad and clear. To be a qualified written request, a written correspondence must reasonably identify the borrower and account and must 'include 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). Any reasonably stated written request for account information can be a qualified written request.").

However, the Wolfe reinstatement letter[2] satisfied the requirements for a response pursuant to RESPA and its implementing regulations. *See* 12 U.S.C. § 2605(e)(2)(C) (requiring a servicer[3] receiving a qualified written request to, within 30 days of receipt of the request, conduct an investigation and "provide the borrower with a written explanation or clarification that includes--(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and (ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower."); 12 C.F.R. § 1024.32 ("Except as otherwise provided in this subpart, disclosures required under this subpart must be clear and conspicuous, in writing, and in a form that a recipient may keep."). Here, the Wolfe reinstatement letter timely provided Plaintiff, in writing and in a clear and conspicuous manner, with the requested information and contact information for further inquiry. *See* [DE 23-6]. The clear and conspicuous nature of the provided reinstatement information is particularly apt in this case given the context – that the affidavit and attached invoices reflecting all charges associated with service of process in the state court foreclosure action was filed in the state court docket in support of a summary judgment motion on April 8, 2015, approximately three months prior to Plaintiff's counsel's request for reinstatement figures, and that the Wolfe letter indicated that any overpayments would be refunded. *See* [DE's 55-1; 23-6].

Moreover, even if it was improper under the FDCPA and/or the FCCPA to request $250 in attorneys' fees for a Motion to Dismiss that had not yet been filed but that would be necessary

[2] Attached as an exhibit to the Amended Complaint, *see* [DE 23-6]
[3] The Court makes no determination as to whether Suntrust is a "servicer" under RESPA.

to dismiss the foreclosure suit in the event Plaintiff reinstated her loan, *see Prescott v. Seterus, Inc.*, 635 F. App'x 640, 644 (11th Cir. 2015) (holding it was a violation of the FDCPA for a mortgage service to send borrower a letter showing the total amount borrower needed to pay for his loan to be reinstated which included estimated fees for future legal services), and/or if the service of process charges in the Wolfe reinstatement letter were inflated, those alleged violations of other federal statutes would not constitute a RESPA violation because the letter is nonetheless fully compliant with the formal and substantive requirements of RESPA and its implementing regulations.

Accordingly, the Court would alternatively dismiss Plaintiff's RESPA claim on the independent ground that the Wolfe reinstatement letter complied with RESPA.

C. *Suntrust is not a debt collector under §1692a(6)(F)(ii)*

Suntrust contends that because it is the original lender on Plaintiff's loan it is not a "debt collector" under §1692a(6)(F)(ii) and, as such, that it cannot be held liable under the FDCPA, as only "debt collectors" are subject to the FDCPA. The Court agrees. *See, e.g.*, *Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir. 2003) (originator of loan not subject to liability under the FDCPA). Moreover, the FDCPA carve-out for the originator of the loan is disjunctive and applies to Suntrust even though the Amended Complaint alleges that the loan was assigned to Nationstar and then back to Suntrust.[4] *See Broughton v. SunTrust Mortg., Inc.*, Case No. 1:12-cv-01432-AT, 2013 U.S. Dist. Lexis 193382 at * 23-24 (N.D. Ga. Sept. 3, 2013), dismissal aff'd *Broughton v. U.S. Bank, N.A.*, 571 F. App'x 891, 892 (11th Cir. 2014) (holding that Suntrust is not considered a debt collector under the FDCPA because Suntrust originated the mortgage loan in 2004 and thus was exempt pursuant to §1692a(6)(F)(ii), even though the loan was

[4] Further, pursuant to the terms of ¶ 9 of the Mortgage, the disputed fees at issue became part of the Mortgage debt, which Suntrust originated.

subsequently assigned by MERS to Suntrust while the debt was in default). In addition, because courts analyzing FCCPA claims are directed by statute that "[i]n applying and construing this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act," *see* Fla. Stat. § 559.77(5), the Court holds that Suntrust likewise is not a debt collector for purposes of FCCPA liability.

Accordingly, the Court would alternatively dismiss Plaintiff's FDCPA and FCCPA claims on the independent ground that Suntrust is not a debt collector under §1692a(6)(F)(ii).

D. *Whether the Florida litigation privilege applies to the FCCPA claim*

Suntrust also maintains that Plaintiff's claim against it in Count II for alleged violations of the FCCPA, Fla. Stat. §559.72(9), is subject to dismissal because it is barred by the Florida litigation privilege doctrine.[5] Based on the rulings *supra*, the Court need not decide whether the litigation privilege applies. Nonetheless, the Court notes that whether "the conduct in question is inherently related to, and occur[ed] during an ongoing judicial proceeding" *see Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1277 (11th Cir. 2004), in the context of this particular case appears to be a factual issue more appropriate for summary judgment or trial.

IV. CONCLUSION

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant Suntrust Mortgage, Inc.'s Motion to Dismiss [DE 38] is **GRANTED**;

[5] The litigation privilege, if applicable, would only apply to the FCCPA claim (Count II) in this case. "Florida's litigation privilege 'does not bar federal claims.'" *Lewis v. Marinosci Law Grp., P.C.*, No. 13-61676-CIV, 2013 WL 5789183, at *4 (S.D. Fla. Oct. 29, 2013) (citations omitted).

2. This case is hereby **DISMISSED WITH PREJUDICE** as to Defendant Suntrust Mortgage, Inc.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 19th day of January, 2017.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies provided to:
Counsel of record