

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

|                                    |   |                       |
|------------------------------------|---|-----------------------|
| IN THE MATTER OF                   | ) |                       |
|                                    | ) |                       |
| PATRICIA ANN MASSIE,               | ) | CASE NO. 02-30940 HCD |
|                                    | ) | CHAPTER 13            |
|                                    | ) |                       |
| DEBTOR.                            | ) |                       |
|                                    | ) |                       |
|                                    | ) |                       |
| DEBRA MILLER and                   | ) |                       |
| PATRICIA ANN MASSIE,               | ) |                       |
|                                    | ) |                       |
| PLAINTIFFS,                        | ) |                       |
| vs.                                | ) | PROC. NO. 08-3008     |
|                                    | ) |                       |
| AMERIQUEST MORTGAGE COMPANY,       | ) |                       |
| AMC MORTGAGE SERVICES INC.,        | ) |                       |
| CITI RESIDENTIAL LENDING INC., and | ) |                       |
| SHERMAN FINANCIAL,                 | ) |                       |
|                                    | ) |                       |
| DEFENDANTS.                        | ) |                       |

Appearances:

Cathleen M. Shrader, Esq., Michael P. O'Hara, Esq., and Thomas P. Yoder, Esq., attorneys for plaintiffs, Barrett & McNagny, LLP, 215 East Berry Street, Fort Wayne, Indiana 46802;

Debra L. Miller, plaintiff, P.O. Box 11550, South Bend, Indiana 46634-0550;

Patricia Ann Massie, pro se, 8761 Doral West Drive #D, Indianapolis, Indiana 46250;

Bernard E. LeSage, Esq., attorney for Ameriquest and AMC Mortgage Services, 1000 Wilshire Boulevard, Suite 1500, Los Angeles, California 90017;

R. William Jonas, Jr., Esq., attorney for Ameriquest and AMC Mortgage Services, Hammerschmidt, Amaral & Jonas, 137 North Michigan Street, South Bend, Indiana 46601;

Rachael H. Berman, Esq., attorney for Ameriquest and AMC Mortgage Services, Buchalter Nemer, PC, 1000 Wilshire Boulevard, Suite 1500, Los Angeles, California 90017;

Mark J. Adey, Esq., and Timothy J. Abeska, Esq., attorneys for Citi Residential Lending, 600 1st Source Bank Center, 100 North Michigan Street, South Bend, Indiana.

## MEMORANDUM OF DECISION

At South Bend, Indiana, on September 30, 2010.

Before the court are two summary judgment motions: The Motion for Partial Summary Judgment, filed by Debra L. Miller, standing Chapter 13 Trustee (“Trustee”), and Patricia Ann Massie, chapter 13 debtor (“debtor” or “plaintiff”); and the Motion for Summary Judgment filed by the defendants Ameriquest Mortgage Company (“Ameriquest”), and AMC Mortgage Services, Inc. (“AMC”) (collectively, “Ameriquest” or “defendants”).<sup>1</sup> Each motion seeks judgment on the plaintiff’s Second Amended Complaint (“Complaint”). After considering the motions, briefs, memoranda and responses of the parties, the court took the matter under advisement.<sup>2</sup>

### BACKGROUND

On June 22, 1999, Patricia Ann Massie purchased a home in South Bend, Indiana. She executed a Note in favor of Ameriquest in the amount of \$44,000.00 (“Note”). As security for the Note, the debtor granted Ameriquest a mortgage (“Mortgage”) on the home. Under the terms of the Mortgage, the debtor was to pay Ameriquest the amounts that would cover taxes, assessments, and insurance (“Escrow Items”). The Mortgage specifically provided that the Lender may not charge the Borrower for “annually analyzing the escrow account.”

On February 27, 2002, the debtor filed a voluntary chapter 13 petition. On March 13, 2002, the debtor filed her chapter 13 Plan. It was confirmed, as amended, on October 8, 2002, without objection from Ameriquest or other creditors or parties in interest. On March 25, 2002, Ameriquest submitted a proof of

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<sup>1</sup> Sherman Financial was dismissed as a defendant from this adversary proceeding on February 19, 2008. Citi Residential Lending, Inc. (“CRL”) was dismissed as a defendant, as well, on July 23, 2009.

<sup>2</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (C), (K), and (O).

claim stating that the principal balance on the Mortgage was \$43,479.82 and that the pre-petition arrearage owed on the Mortgage was \$7,639.28. *See id.*, Ex. A (Proof of Claim).

Under the terms of the debtor's confirmed Plan ("Plan"), the Trustee was required to make 36 monthly payments to Ameriquest under the Note and to cure the arrearages. Also, defaults on the Note and Mortgage were to be deemed cured and the account current upon payment in full of the pre-petition arrearage claims and interest owed on the Note. The Trustee began making those payments in April 2002. Article III of the Plan further provided:

If, during the life of this plan, the monthly principal and interest maintenance claim must be modified due to a change in an adjustable mortgage interest rate, or, the monthly escrow agreement maintenance claim must be modified due to a legitimate change in the escrow reserve requirements, then the mortgage creditor will request such modification in writing, providing notice to both the Standing Chapter 13 Trustee and counsel for the debtor; and after that, absent any objection made within thirty (30) days of such notice, the Trustee will modify disbursements to the mortgage creditor accordingly.

R. 120 at 4 (quoting Plan provision).

Ameriquest provided administrative servicing on the Massie Note and Mortgage until March 31, 2005. AMC provided that servicing from March 31, 2005 through September 2007. Citi Residential Lending, Inc. ("CRL") began servicing the debtor's Note and Mortgage on October 1, 2007. Neither Ameriquest nor AMC provided the Trustee with notice or a copy of any notice to the Debtor respecting the change in servicing, and the Trustee continued to send all payments to Ameriquest, which continued to accept all payments long after the time AMC said it began servicing the Massie Note and Mortgage. *See id.* at 5.

Throughout the term of the Plan, the Trustee received correspondence from Ameriquest informing the Trustee and the debtor of periodic changes in the loan interest rate; the Trustee responded by adjusting the monthly payments and paying them on behalf of the debtor. As the bankruptcy neared its completion, the Trustee audited the debtor's case to verify whether the Note was post-petition current. On May 7, 2007, after the audit, the Trustee sent to Ameriquest by certified mail a "qualified written request"

(“QWR”) seeking to confirm the status of the debtor’s Note and Mortgage.<sup>3</sup> On May 31, 2007, the Office of the President of AMC acknowledged receipt of the request. On June 21, 2007, AMC sent a letter of response to the Trustee. It included a payment history and escrow balance history. On July 26, 2007, the Trustee’s office wrote AMC questioning the large negative escrow balance of \$1,235.23 it reported. The letter requested an accounting of the dates and amounts paid for taxes and insurance, copies of escrow analyses throughout the bankruptcy, and copies of notices sent to the Trustee or debtor. On August 16, 2007, AMC provided to the Trustee what it asserted was an escrow breakdown. It also sent a letter signed by Danny H. Hernandez, Office of the President, which stated: “AMC does not analyze loans while in bankruptcy.” R. 120 at 7. The Trustee had received a similar communication from an AMC “bankruptcy specialist” in connection with a QWR inquiry for another debtor, Dale Thomas Laskowski; the “specialist” informed the Trustee that it was AMC’s policy not to analyze any accounts in bankruptcy. *Id.*

On September 14, 2007, AMC and CRL sent Massie a joint notification that the servicing of her Mortgage loan had been “assigned, sold, or transferred” from AMC to CRL effective October 1, 2007.

On December 17, 2007, the Trustee received from the debtor’s bankruptcy attorney a copy of an “Escrow Account Disclosure Statement & Change of Payment Notice” that CRL sent to Massie. It demanded that the debtor pay \$368.82 per month additional payments as a “shortage/surplus payment” to address the substantial escrow account shortage. On September 23, 2008, Ameriquest (not AMC) paid to CRL \$5,247.08 as “Settlement for Escrow Payment.” On October 2, 2008, CRL filed a Notice in the

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<sup>3</sup> A “qualified written request” (“QWR”) is a legal term of art found in the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 *et seq.* It is “a written correspondence . . . that (i) includes . . . 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). In addition, § 2605(e) requires that “any servicer of a federally related mortgage loan” which receives a QWR from the borrower or its agent “shall provide a written response acknowledging receipt of the correspondence within 20 days” and shall “make appropriate corrections” to the borrower’s account or “provide the borrower with a written explanation” within 60 days. 12 U.S.C. § 2605(e)(1)(A), (e)(2).

debtor's bankruptcy case that, as of October 2, 2008, Massie was deemed current of her obligations under the Note and Mortgage and that the current balance of the Mortgage was zero.

### AMENDED COMPLAINT

The debtor's Complaint sets forth its claims in six Counts.

The Complaint's Count I charged violations of the Real Estate Settlement Procedures Act ("RESPA").<sup>4</sup> It alleged that the defendants are each a "servicer of a federally related mortgage loan" under RESPA and that they violated RESPA by failing "to conduct an escrow account analysis of Debtor's account each year, to determine, on a yearly basis, whether a surplus, shortage or deficiency existed in Debtor's escrow account, and to notify Debtor if there was a deficiency or shortage in his escrow account." R. 32, ¶¶ 36, 37; *see* 12 U.S.C. § 2601 *et seq.*; 24 CFR § 3500 *et seq.*<sup>5</sup> Count I claimed that the defendants' failure to perform their duties under RESPA demonstrated a "willful disregard for their statutory requirements as a mortgage servicer and a pattern of non-compliance with RESPA." *Id.*, ¶ 37. It sought all damages recoverable under RESPA, including punitive and exemplary damages under 11 U.S.C. § 105.

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<sup>4</sup> The Real Estate Settlement Procedures Act ("RESPA") is a federal statute enacted to provide consumers "with greater and more timely information on the nature and costs of the settlement process" and to protect consumers from "unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). Its purpose is "to effect certain changes in the settlement process for residential real estate that will result" in better disclosure of settlement costs to home buyers and sellers, elimination of kickbacks, reduction in amounts escrowed for payment of taxes and insurance, and other reforms. *Id.*, § 2601(b); *See Williams v. Countrywide Home Loans, Inc.*, 504 F. Supp. 2d 176, 191 (S.D. Tex. 2007).

The Real Estate Settlement Procedures Act ("RESPA") imposes a duty upon loan servicers to respond to certain borrower inquiries. The Act provides for individual causes of action and "allows for actual damages, as well as statutory damages upon a showing of a pattern or practice of noncompliance with the duty to respond to borrower inquiries."

*Hopkins v. First NLC Fin'l Servs, LLC (In re Hopkins)*, 372 B.R. 734, 746 (Bankr. E.D. Pa. 2007) (citation omitted).

<sup>5</sup> The Department of Housing and Urban Development ("HUD") promulgated Regulation X as the method for implementing RESPA. *See* 12 U.S.C. Regulation X, 24 CFR § 3500 *et seq.*

The Complaint's Count II charged a breach of express contract. It alleged that the defendants, by failing "to timely advise Debtor and/or Trustee of the escrow shortfall," have prejudiced the debtor and have required her to pay more than her disposable income to complete her chapter 13 obligations. *Id.* ¶ 44. Their failure to notify impaired the debtor's ability to receive a bankruptcy discharge and caused the Trustee to devote additional resources to administration of this bankruptcy.

The Complaint's Count III alleged a breach of implied covenants. It asserted that the defendants' actions demonstrated their lack of good faith and fair dealing regarding their duties under the confirmed Plan. *See id.* ¶ 50.

Count IV charged a violation of the automatic stay. It alleged that the defendants "willfully and intentionally violated the automatic stay of 11 U.S.C. § 362 by demanding from Debtor payments in excess of what were due and owing under the Confirmed Plan" and "by applying funds received from the Trustee under the Confirmed Plan other than as required by the Confirmed Plan." *Id.*, ¶¶ 53, 54.

Count V, an "abuse of process" charge, asserted that the "Defendants' demands for payment from Debtor of sums that have not been reviewed or approved by the Bankruptcy Court and other than as set forth in the Confirmed Plan, are an attempt to subvert the provisions and jurisdiction of the United States Bankruptcy Code and Orders of this Court." It suggested that the defendants "engaged in similar misconduct" in other proceedings and requested "exemplary damages." *Id.*, ¶ 57.

Finally, in Count VI, the debtor, through the Trustee, sought declaratory relief.

Now before the court are motions for summary judgment on the Complaint.

### DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. See *Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 322. “To avoid summary judgment . . . the nonmoving party [is] required to set forth ‘specific facts showing that there is a genuine issue for trial,’ Fed. R. Civ. P. 56(e), and, further [has] to produce more than a scintilla of evidence in support of his position.” *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). In order to demonstrate that a real factual dispute exists, the nonmovant must produce evidence of the dispute rather than relying solely on the allegations or denials in its pleadings. See *Barber v. United States (In re Barber)*, 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L.B.R. B-7056-1. Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

In this adversary proceeding, there are cross motions for summary judgment. The Trustee’s motion seeks a judgment on Counts I and II of the Complaint. The defendants’ motion seeks a judgment on all counts; however, the Trustee has conceded that the defendants were entitled to judgment in their favor on Counts III and IV, and agrees with the defendants that Count VI is moot. Count V, entitled “Abuse of Process,” actually is not argued or claimed as worthy of summary judgment by either party. The focus of the parties, therefore, is on the alleged RESPA violations of Count I and alleged breach of the Plan term in Count II. The parties appear to agree that the material operative facts are not in dispute. The court begins with the first-filed Motion of the Trustee. Because the positions argued in the defendants’ Motion for Summary Judgment correspond closely with those in the Opposition to the Trustee’s Motion, the court will review and consider those contentions jointly as challenges to the Trustee’s Motion.

### Motion for Partial Summary Judgment

The Trustee requested judgment in her favor on Counts I and II of the Complaint. Count I concerned violations of RESPA. Both Ameriquest and AMC, as servicers of federally related mortgage loans, were subject to RESPA. The Trustee described the defendants' failures (a) to conduct an escrow account analysis of the debtor's account each year, and to determine on a yearly basis whether a surplus, shortage or deficiency existed in the debtor's escrow account, in violation of 24 C.F.R. § 3500.17(c); (b) to notify the debtor if there was a deficiency or shortage in her escrow account, in violation of 24 C.F.R. § 3500.17(f)(5); and (c) to make appropriate corrections in the account of the borrower in response to a QWR and to transmit to the borrower a written notification of such corrections, in violation of 12 U.S.C. § 2605(e)(2)(A).

According to the Trustee, the evidence demonstrated that it was the policy and procedure of Ameriquest and AMC to ignore their statutory duties under RESPA when a borrower's account went into bankruptcy. AMC specifically informed the Trustee, for example, that "AMC does not analyze loans while in bankruptcy." R. 120 at 11. At the time they were servicing the Massie Mortgage account, both Ameriquest's and AMC's policies and procedures, as expressed in their policy and procedure manuals for the pertinent years, stated that accounts are not analyzed when in bankruptcy. The manuals for AMC and Ameriquest specifically provided:

In accordance with RESPA, the Escrow Analysis Unit performs an annual escrow analysis . . . . Loans in foreclosure or bankruptcy are not analyzed every 12 months, but will be analyzed if reinstated and 12 or more months have elapsed since the last analysis.

*Id.* As a result, neither Massie nor the Trustee was informed of changes, shortages or deficiencies in Massie's escrow account. The Trustee noted that, in contrast, notifications were sent often about changes in the interest rate being charged; the Trustee then made the required adjustments in payments under the Note

and Plan. However, because it was the pattern and practice of the defendants to refuse to analyze any debtor's escrow account when the debtor was in bankruptcy, it was only after the Trustee had made nearly all the Plan payments that she learned that AMC claimed there was a substantial deficiency existing in Massie's escrow account.

This stated company-wide failure to analyze accounts in bankruptcy was the policy of both Ameriquest and AMC. The Trustee pointed out that RESPA requires a servicer to "notify the borrower not less than annually of any shortage of funds in the escrow account." R. 120 at 12 (quoting 12 U.S.C. § 2609(b)). The defendants' company-wide policy violated that RESPA provision.

In addition, when AMC became the servicer of the Massie account, AMC was required under 24 C.F.R. § 3500.17(f) to perform an analysis of the escrow account. However, it never undertook the analysis, and the escrow account deficit rose further as a result. The Trustee argued that, because of their failure to comply with the RESPA requirements, neither Ameriquest nor AMC had a right to recover the alleged arrearages from Massie, and AMC was obligated to correct Massie's account, rather than demanding the amounts and providing erroneous information to the successor servicer, CRL.

Finally, the Trustee argued that AMC failed to make the appropriate corrections to the debtor's account and, instead, claimed that the debtor was responsible for negative escrow amounts. When CRL became the servicer, AMC reported that those negative escrow amounts were due and owing. Thus CRL demanded payment of a substantial escrow shortage. The Trustee urged the court to conclude that "it was the deliberate policy and practice of both Ameriquest and AMC to violate RESPA and ignore the potential significant changes in a debtor's escrow account until the debtor had completed his or her plan and sought a discharge." R. 120 at 15. As a result, she pointed out, Massie still has not obtained her discharge and the Trustee's office had devoted substantial resources to the resolution of this claim.

Count II focused on the debtor's confirmed Plan. It alleged that the defendants failed to abide by the Plan's requirement that, if escrow account payments must be modified, "the mortgage creditor will

request such modification in writing, providing notice to both the Standing Chapter 13 Trustee and counsel for the debtor.” R. 120 at 16. As a result, the debtor owed over \$5,000 to satisfy the negative escrow account.

The Trustee stated that a confirmed plan is a contract, and the parties to the plan are bound by its terms. *Id.* (citing cases). She then argued that the defendants deliberately failed to abide by the terms of the plan and that such a failure constituted a breach of the Plan, which can be remedied under § 105. Under that provision, she said, the court may “enforce rights incorporated by confirmed plans” and “protect the promised fresh start.” *Id.* at 17 (citing cases). This court has inherent and statutory power, under § 105, to enforce its confirmation order, to impose contempt sanctions, to compensate an injured party, and to punish wrongdoers. *Id.* (citing *In re Payne*, 387 B.R. 614, 639 (Bankr. D. Kan. 2008)). The Trustee pointed specifically to the defendants’ failure to notify the debtor respecting escrow account changes, despite their affirmative obligations to do so under the Plan. However, their conduct was consistent with the defendants’ company policies of not conducting any analysis of the escrow account while the loans were in bankruptcy. Consequently, the debtor still is in bankruptcy and the Trustee has been forced to expend substantial time and resources on this case.

According to the Trustee, the evidence demonstrated that the defendants have engaged in a pattern and practice of willfully violating RESPA and that both defendants willfully violated the terms of the confirmed Plan. She asserted that it was appropriate for the court to remedy the defendants’ violations of the terms of the debtor’s Plan by awarding the Trustee damages to compensate her for the expenditures incurred in addressing the defendants’ violations of the Plan and in bringing this adversary proceeding, including an award of attorney fees. R. 120 at 19. The court should also award punitive damages to ensure such behavior is not repeated. *Id.* There are no genuine issues of material fact regarding the defendants’ violation of the confirmed Plan; consequently, she claimed, she as the Trustee is entitled to judgment in her favor as a matter of law and the court should set the issue of damages over for hearing. *Id.* at 20.

Ameritrust and AMC filed a brief in opposition to the Trustee's Motion for Partial Summary Judgment. *See* R. 126. They proffered their own Statement of Facts, but did not file a statement of genuine issues challenging the Trustee's presentation of material facts. The court therefore "will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy." N.D. Ind. L.B.R. B-7056-1.

The defendants do not challenge or deny any facts underlying the Trustee's allegations that the defendants violated RESPA under the following statutory provisions:

(a) by failing to conduct an escrow account analysis of the debtor's account each year and to determine whether a surplus, shortage or deficiency existed, in violation of 24 C.F.R. § 3500.17(c);

(b) by failing to notify the debtor if there was a deficiency or shortage in her escrow account, in violation of 24 C.F.R. § 3500.17(f)(5); and

(c) by failing to make appropriate corrections in the borrower's account in response to a QWR and failing to transmit to the borrower a written notification of such corrections, in violation of 12 U.S.C. § 2605(e)(2)(A).<sup>6</sup>

The defendants instead claim that the Trustee and/or the debtor cannot recover damages under the cited RESPA statutory provisions and the corresponding regulations. The defendants first insist that damages are not recoverable under § 2605 by the Trustee, but may be recovered by a borrower.

Section 2605(f) imposes liability on servicers that violate RESPA by, *inter alia*, failing to make the required disclosures or responses. The following damages are recoverable under RESPA for a section 2605 violation: "(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 \$1,000." 12 U.S.C. § 2605(f)(1).

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<sup>6</sup> The defendants assert that the Amended Complaint does not allege any violation of § 2605; that charge was brought in the Trustee's brief. The court finds that the Complaint alleged that it sought a judgment and damages against the defendants for their failure to comply with their statutory duties under RESPA, 12 U.S.C. § 2601 *et seq.* It described the Trustee's attempts to verify the balance due and the defendants' failure to analyze the escrow account after they made incorrect assertions in response to the QWR. The court determines, therefore, that sufficient detail was provided to satisfy the required "short and plain statement of the claim" required in Fed. R. Civ. P. 8 and Fed. R. Bankr. P. 7008.

The undisputed material facts demonstrate that the defendants, after receiving a QWR, failed to respond to it by making appropriate corrections in the Massie account and by notifying Massie in writing of the corrections. The court finds that the defendants did not respond properly to the debtor's QWR. They should have reviewed their method of applying post-petition payments and should have calculated the escrow deficiency; then they should have communicated their explanations and corrections to the debtor. These steps were not taken; in fact, no steps were taken to correct the asserted negative balance in the debtor's escrow account until after the Trustee brought this adversary proceeding. The defendant's failure to fulfill their duties under § 2605(e)(2)(A) and to notify the debtor of the changes to her escrow account violated RESPA. *See In re Payne*, 387 B.R. at 637-38.

Failure to respond to a qualified written request under RESPA requires the lender to compensate the individual borrower for any actual damages the borrower incurs as a result of the failure. Actual damages may include recovery for emotional distress. The court may also award costs and reasonable attorney's fees. The plaintiff must prove his actual damages and prove they were proximately caused by the defendant's RESPA violation.

*Id.* at 639. The violation has been established and the debtor-borrower may recover under § 2605(f).

The court finds, therefore, that the debtor may be compensated for whatever actual damages were proximately caused by the defendants' RESPA violation, plus costs and reasonable attorney's fees. *See In re Thompson*, 350 B.R. 842, 852 (Bankr. E.D.N.Y. 2009). Actual damages are limited to economic pecuniary injury, including out-of-pocket expenses, mental anguish, and emotional distress. *See In re Tomasevic*, 273 B.R. 682, 686 (Bankr. M.D. Fla. 2002). In the view of this court, the defendants' failure to respond to the debtor with corrections and a written notice thereof led to her continued years in bankruptcy, long past her expected discharge. It finds that the debtor's allegations contain the requisite specificity to demonstrate how the defendants' failures resulted in actual harm. However, the court considers meritless the defendants' assertion that the debtor's only damages claim was for her attorney's fees in this case, and the CRL settlement of \$5,000 more than adequately covered those fees.

RESPA provides that individuals damaged by a § 2605 RESPA violation are entitled to receive not only actual damages but also additional damages, up to a maximum of \$1,000.00, “in the case of a pattern or practice of noncompliance with the requirements of this section.” § 2605(f)(1); *see Moore v. One West/Indy Mac Bank*, 2010 WL 339855 at \*7 (D. Colo. July 12, 2010); *In re Fitch*, 390 BR. 834, 838 (Bankr. E.D. La. 2008). Courts have interpreted the phrase to mean “a standard or routine way of operating.” *In re Maxwell*, 281 B.R. 101, 123 (Bankr. D. Mass. 2002). To demonstrate a pattern of noncompliance, the Trustee set forth the policy of Ameriquest and AMC, as seen in their manuals and in their correspondence to the Trustee, stating that accounts were not analyzed when in bankruptcy. The company-wide procedure was used by both defendants and was carried out in this debtor’s bankruptcy and in the bankruptcy of Dale Thomas Laskowski. However, it does not reflect merely two discrete violations of RESPA. *See In re Thompson*, 350 B.R. at 853. It is an example of a standard way of operating established by the companies, a practice they followed when deciding whether to analyze accounts during the relevant years. The court finds that the plaintiffs have alleged adequately a basis for imposing additional statutory damages for a pattern or practice of noncompliance under § 2605(f)(1)(B).

There is no provision in § 2605(f) for punitive damages. *See In re Tomasevic*, 273 B.R. at 686. Therefore no punitive award is given under that statute. Also, the court finds nothing in the language of § 2605(f) that would allow a trustee to claim damages. The court concludes that the debtor is entitled to receive actual damages, additional damages, costs and reasonable attorney fees under § 2605(f).

Count I charges that the defendants also violated 24 C.F.R. § 3500.17(c), by failing to conduct an annual escrow account analysis of the debtor’s account each year, and 24 C.F.R. § 3500.17(f)(5) by failing to notify the debtor if there was a deficiency or shortage in her escrow account. The defendants respond that the Trustee has no standing to recover damages under those regulations.

As the defendants properly recognized, RESPA provides a private right of action for borrowers for violations of § 2605. *See Garibay v. American Home Mortg. Corp.*, 2010 WL 1291475 at \*4 (S.D. Cal.

March 26, 2010). But there is no private right of action under § 2609. *See Byrd v. Homecomings Fin'l Network*, 407 F. Supp. 2d 937, 945 (N.D. Ill. 2005). A regulation that implements § 2609 is 24 C.F.R. § 3500.17(m), which “provides for penalties to be imposed by the Secretary of Housing and Urban Development upon the lender’s failure to submit an initial or annual escrow statement.” *In re Johnson*, 384 B.R. 763, 772 (Bankr. E.D. Mich. 2008). “Neither the statute nor the regulations provide for a private cause of action by a borrower on account of the failure of the lender to comply with the requirements of RESPA.” *Id.* For that reason, neither the Trustee nor the debtor may recover damages for the defendants’ violations of 24 C.F.R. § 3500.17(c) or (f)(5). However, cases clearly hold that when a lender or servicer fails to conduct an escrow analysis annually and fails to notify the borrower at least once annually if there is a shortage or deficiency in the escrow account, it has violated § 3500.17. Accordingly, the cases waive the lender’s right to recover the advances from the borrower.<sup>7</sup> *See Chase Manhattan Mortg. Corp. v. Padgett*, 268 B.R. 309 (S.D. Fla. 2001); *In re Payne*, 387 B.R. at 637; *In re Dominique*, 368 B.R. 913, 921 (Bankr. S.D. Fla. 2007). In the court’s view, neither defendant had the right to recover the escrow deficiencies from the debtor.

RESPA does not provide a private right of action under § 2609. However, remedies for alleged unlawful lender conduct, including assessing undisclosed post-petition fees, may be pursued under 11 U.S.C. § 362 for violating the automatic stay if the lender attempts to collect the fees from estate property, under 11 U.S.C. § 105 for violating the confirmation order, and under RESPA § 2605 for failing to respond to a qualified written request, which would require the lender to disclose a full and accurate accounting of the loan.

*In re Payne*, 387 B.R. at 630.

The Trustee asserted her right to summary judgment on Count II of the Complaint, as well. She alleged that the defendants breached a provision of the debtor’s chapter 13 Plan. The Plan, which is contractual in nature, contained this term:

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<sup>7</sup> Ameriquest stated that it did comply with § 3500.17(f)(5) by providing the debtor notice of the deficiencies in the debtor’s escrow account with the debtor’s 1098 Form. Internal Revenue Service Form 1098 is used to report information, such as deductions for home mortgage interest and property taxes. It does not function as a notice of a deficiency in an escrow account. In any case, the court can find no Form 1098 in the record as evidence of Ameriquest’s compliance.

If, during the life of this plan, the monthly principal and interest maintenance claim must be modified due to a change in an adjustable mortgage interest rate, or the monthly escrow agreement maintenance claim must be modified due to a legitimate change in the escrow reserve requirements, then the mortgage creditor will request such modification in writing, providing notice to both the Standing Chapter 13 Trustee and counsel for the debtor; and after that, absent any objection made within thirty (30) days of such notice, the Trustee will modify disbursements the mortgage creditor accordingly.

The defendants, although bound by the terms of the Plan, failed to abide by this term. They provided no notice that payments must be modified when there was a change in the escrow reserve requirements. Because the defendants failed to notify the debtor and Trustee of the escrow shortfall, the Trustee contended, the shortfall was not paid during the Plan and the debtor, at the end of her Plan, was required to make many more payments to complete her chapter 13 obligations. That failure to provide notice constituted a breach of the Plan, which can be remedied under § 105: “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105. The Trustee argued that the court could enforce the rights that were found in the confirmed Plan under the court’s statutory power pursuant to § 105.

According to the defendants’ interpretation of the relevant plan provision, however, the conduct of Ameriquest and AMC did not violate the provision. They explained:

As worded, the plan requirement to give notice is conditional: No notice is required if no plan payments have to be modified. Under this language, the lender has the option to file a post-petition claim for reimbursement prior to the debtor’s discharge. In other words, the lender has the option to wait until the plan is completed to try and collect amounts due and owing for any advances the lender made. The Confirmed Plan does not require that Ameriquest give notice if the amounts due and owing changed. Rather, it requires Ameriquest to give notice if the plan payments were to change.

R. 126 at 14. Therefore, the defendants argue, the failure to give notice is not a breach of the Plan.

The court finds the defendants’ reading of this Plan provision tortured. A chapter 13 plan intends that the obligations of the Note and Mortgage be current when the Plan payments are completed. *See In re Padilla*, 379 B.R. 643, 661 (Bankr. S.D. Tex. 2007) (“A primary purpose of the Bankruptcy Code is to grant debtors a ‘fresh start’ after completing a chapter 13 plan.”). That purpose cannot be fulfilled if

the lender has “the option to wait until the plan is completed” to collect the escrow deficiency amounts. The provision states clearly that, whenever the escrow amount must be modified because there was a legitimate change in the escrow reserve, the mortgage creditor must request the change in writing, providing notice to the Trustee and debtor’s counsel. The Trustee will modify her payments within 30 days as long as there are no objections. The court does not accept the defendants’ misreading of the Plan provision. The court finds that the defendants failed to request the change in writing and to provide notice as this provision required. Its deliberate violation of the Plan term is a breach of an express contract.

The defendants argued that § 105, on which the Trustee relied, did not entitle the Trustee to recover punitive damages. As it considers its use of § 105, the court realizes that, in chapter 13 cases, the trustee is an integral part in the achievement of the lofty “fresh start” goals of the Bankruptcy Code.

Section 105 allows the Court to issue orders necessary to assure the Code’s purposes are fulfilled. The Court and the Chapter 13 Trustee are charged with fully administering a case through completion. Administering a successful Chapter 13 plan requires full disclosure from all participants and requires that plan confirmation is not thwarted by mortgagees who assess unnoticed increases in the borrower’s debt believing they can collect from their collateral upon completion of an otherwise successful Chapter 13 plan.

*In re Payne*, 387 B.R. at 631.

“Courts have used § 105 to remedy violations of confirmed plans.” *In re Cano*, 410 B.R. 506,540 (Bankr S.D. Tex. 2009). They hold civil contempt powers under § 105(a), with “broad discretion to fashion a remedy for civil contempt.” *In re Workman*, 392 B.R. 189, 195 (Bankr. D.S.C. 2007); *see also In re Rimsat, Ltd.*, 212 F.3d 1039, 1049 (7th Cir. 2000) (stating that bankruptcy court was justified in using § 105(a) “in order to ensure that all the culpable parties received an appropriate sanction”).

[W]hen a confirmed plan has been ignored and undermined, § 105 permits this Court to take any action or make any determination necessary to enforce its confirmation order and set this case on the right course. The Court has both inherent and statutory power to impose sanctions for contempt in order to impose compliance, to compensate an injured party, and to punish the refusal to do what is required.

*In re Payne*, 387 B.R. at 639. The court finds that the debtors and the Trustee have viable, legitimate claims to actual damages in this case. Nevertheless, it has determined that there are genuine issues of material fact

concerning the types and amounts of the damages that can be claimed in this case. The case before this court is based upon cross motions for summary judgment. A showing of damages is not part of the pleading standard, and the current record before the court does not allow for an award of summary judgment to either party with respect to some of the counts. The court therefore finds that genuine issues of material fact exist.

Accordingly, the court grants summary judgment in favor of the plaintiffs on Count I of the Complaint. It concludes that the debtor is entitled to receive actual damages, additional damages, costs and reasonable attorney fees under 12 U.S.C. § 2605(f). The court grants summary judgment in favor of the plaintiffs on Count II. It concludes that the defendants breached the confirmed Plan of the debtor and that the debtor and the Trustee are entitled to damages under 11 U.S.C. § 105(a). The court grants summary judgment in favor of the defendants on Counts III and IV of the Complaint. The court denies any award of summary judgment to either party on Counts V and VI. The court requires an evidentiary hearing on the issue of the damages claimed by the plaintiffs and on the issue of whether Ameriquest's payments to the debtor and the Trustee cured any deficiency and eliminated the possibility of damages or sanctions. Trial in the matter will be set by separate order.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT