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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILLIP ALAN DESSER, MARLO ILYNE DESSER, Plaintiffs, v. U.S. BANK, N.A.; US BANK HOME MORTGAGE, a division of U.S. BANK, N.A. NORTH AMERICAN SAVINGS BANK, F.S.B., a federal savings bank, NATIONAL DEFAULT SERVICING CORPORATION, a corporation, Defendants.	Case No. CV 13-09190 DDP (CWx) **ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS FIRST AMENDED COMPLAINT** [Dkt. No. 24]

Before the court is a Motion to Dismiss Fillip Alan Desser and Marlo Ilyne Desser ("Plaintiffs")'s First Amended Complaint ("FAC") filed by Defendant U.S. Bank, N.A. on behalf of itself and Defendant U.S. Bank Home Mortgage. (Dkt. No. 24.) The matter is fully briefed and suitable for decision without oral argument. Having considered the parties' submissions, the court adopts the following order.

I. Background

The following alleged facts are drawn from Plaintiffs' FAC:

In April 2007, Plaintiffs purchased a home with a first trust deed loan from North American Savings Bank, F.S.B. (See FAC ¶ 8.) The loan was serviced by a division of Defendant U.S. Bank, N.A., U.S. Bank Home Mortgage (collectively, "Defendant").[1] (See id. ¶ 9.)

In July 2009, Defendant mailed Plaintiffs a loan modification offer. (See id. at ¶ 10.) To accept the offer, Plaintiffs were required to agree to the Home Affordable Mortgage Protection ("HAMP") Trial Period Plan agreement ("TPP"). (See id.) Under the TPP, Plaintiffs were obligated to make trial modification payments of $2015.84 in August 2009, September 2009, and October 2009. (Id. ¶ 11.) The TPP stated that if Plaintiffs complied with the TPP's terms, Plaintiffs' mortgage would be modified pursuant to HAMP's rules. (Id. at ¶ 10.)

Plaintiffs accepted the offer, signed the TPP agreement, and timely paid each trial payment. (Id. ¶ 11.) After Plaintiffs paid the final trial payment, Defendant requested additional paperwork from Plaintiffs. (Id. ¶ 12.) On October 12, 2009, Plaintiffs complied with the documentation request. (Id. ¶ 13.)

On October 29, 2009, Plaintiffs called Defendant because they had not received any information about whether they qualified for a final HAMP loan modification. (Id. ¶ 14.) Plaintiffs were told by a representative in Defendant's HAMP Department to make a fourth

[1] U.S. Bank N.A. asserts that U.S. Bank Home Mortgage, a division of U.S. Bank N.A., has been erroneously sued in this action as a separate entity. (Motion at 1.)

trial modification payment in November 2009. (Id.) Plaintiffs made the requested payment. (Id. ¶ 15.)

On approximately November 19, 2009, Plaintiffs received a Final Modification Agreement ("Agreement"). (Id. ¶ 16 and Ex. C.) The Agreement required Plaintiffs to pay a monthly mortgage payment of $2084.49, an amount slightly higher than the trial payment amount of $2015.84. (Id.) The Agreement contained a payment schedule requiring that the first mortgage payment be made by October 1, 2009. (Id.) However, because Plaintiffs received the Agreement after the initial payment was due under the Agreement's payment schedule, Plaintiffs were not aware of and did not pay the October 2009 and November 2009 payments required by the schedule. (See id.) On December 2, 2009, Plaintiffs notarized and mailed the Agreement to Defendant. (Id. ¶ 17.)

Plaintiffs subsequently attempted to obtain confirmation from Defendant that their HAMP modification was in place and requested a copy of the Agreement signed by Defendant. (Id. ¶ 18.) However, Defendant failed to provide such confirmation or a signed copy of the Agreement. (Id.)

Instead, on March 18, 2010, Plaintiffs received a letter from Defendant denying their pending loan modification for failure to provide requested documentation. (Id. ¶ 19.) Exasperated, Plaintiffs contacted Defendant again and were told by a bank representative that they should not worry and that their application was still under review. (Id.) The representative explained that the problem in their file was a result of the fourth trial payment, which Defendant's new software could not process, resulting in their fourth payment being misapplied. (Id.) The

representative further advised Plaintiffs that new loan modification documents would be generated, which Plaintiffs would need to sign, and that Plaintiffs should not make any payments until this occurred because the exact amount of the re-worked modification was not yet known and if a payment was not sent in the exact amount required it would also be misapplied and cause further problems with their application. (Id. ¶ 21)

On March 24, 2010, a representative of Defendant informed Plaintiffs that Defendant had not received the original, notarized, final modification documents Plaintiffs had sent on December 2, 2009. (Id. ¶ 22.) The representative confirmed that Plaintiffs should stop making payments due to system adjustments that Defendant was undertaking. (Id.) Per the representative's instructions, Plaintiffs re-sent the documents, with copies of the notary journal. (Id. ¶ 23.)

Plaintiffs' mortgage statements continued, up through December 2010, to state that they were $59,920.35 in arrears on their mortgage and that the interest rate on their loan was 6.000%, despite their having finalized a modification at 2.000%. (Id. ¶ 24 and Ex. F.)

In January 2011, Plaintiffs' mortgage statement for the first time reflected the terms of the finalized HAMP modification. (Id. ¶ 25.) However, although the January 2011 statement indicated the correct interest rate and monthly payment, the statement indicated that Plaintiffs had a past due amount of $28,413.15. (See id. and FAC Ex. G.) Upon receipt of this statement, Plaintiffs contacted Defendant on numerous times, but “U.S. Bank did not respond appropriately” and Plaintiffs' file was referred for foreclosure.

(Id. ¶ 25.)

On June 3, 2011, U.S. Bank Home Mortgage and National Default Servicing Corporation recorded a Notice of Default alleging arrearages of $49,883.46 as of May 28, 2011. (Id. ¶ 27 and Ex. H.)

On September 6, 2011, Defendant substituted National Default Servicing Corporation ("NDSC") as trustee in place of Fidelity National Title Company, the original trustee on the mortgage. (Id. ¶ 29 and Ex. J.) On the same day, NDSC recorded a Notice of Trustee's Sale, alleging an "unpaid balance and other charges" of $422,003.57 and setting a sale date of September 27, 2011. (Id. ¶ 30 and Ex. K.) On November 13, 2012, NDSC recorded a second Notice of Trustee's Sale, alleging an "unpaid balance and other charges" of $431,168.98 and setting a sale date of December 4, 2012. (Id. ¶ 31 and Ex. L.)

Throughout the foreclosure process, Plaintiffs sought to get the HAMP Modification problems corrected "according to the promises made to them by U.S. Bank," including by engaging the assistance of several attorneys and a loan modification specialist and sending numerous letters to Defendant. (Id. ¶ 32.) Plaintiffs were also forced into bankruptcy in an attempt to save their property through a Chapter 13 reorganization on three separate occasions. (Id.)

On January 24, 2013, Plaintiffs received a letter from Defendant summarizing its activity on Plaintiffs' case. The letter indicated that the final loan modification documents were mailed to Plaintiffs on November 19, 2009 and their first modification payment was due October 1, 2009. (Id. ¶ 33.) It stated and that Plaintiffs' modification paperwork was received by Defendant on March 26, 2010 and was processed December 8, 2010. (Id.)

On August 30, 2013, Plaintiff Marlo Desser received an offer letter of employment which included a guaranteed salary and benefits from a company in the financial sector. (Id. ¶ 37.) However, she was informed on or about September 10, 2013 that the offer letter had to be rescinded because of negative credit reporting by Defendant concerning her default. (Id.)

Plaintiffs filed the instant action in Los Angeles County Superior Court on November 8, 2013. (See Notice of Removal ¶ 1.) Defendant removed the action to this court on December 20, 2013. (See id. at ¶ 13.) Plaintiffs assert seven causes of action: (1) breach of written contract, (2) breach of the implied covenant of good faith and fair dealing, (3) fraudulent misrepresentation, (4) promissory estoppel, (5) negligent misrepresentation, (6) declaratory relief, and (7) preliminary and permanent injunction.

On May 19, 2014, Defendant filed the instant Motion to Dismiss. (Dkt. No. 24.) The foreclosure process has been stayed during the pendency of this action.

II. Legal Standard

A complaint will survive a motion to dismiss when it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). When considering a Rule 12(b)(6) motion, a court must "accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir.2000). Although a complaint need not include "detailed factual allegations," it must offer

"more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or allegations that are no more than a statement of a legal conclusion "are not entitled to the assumption of truth." Id. at 679. In other words, a pleading that merely offers "labels and conclusions," a "formulaic recitation of the elements," or "naked assertions" will not be sufficient to state a claim upon which relief can be granted. Id. at 678 (citations and internal quotation marks omitted).

"When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief." Id. at 679. Plaintiffs must allege "plausible grounds to infer" that their claims rise "above the speculative level." Twombly, 550 U.S. at 555. "Determining 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." Iqbal, 556 U.S. at 679.

III. Discussion

In moving to dismiss Plaintiffs' FAC, Defendant makes the following arguments: (A) that all of Plaintiffs' claims fail for lack of damages or preemption under the Fair Credit Reporting Act, (B) that Plaintiffs fail to state a claim for breach of contract or breach of the implied covenant of good faith, (C) that Plaintiffs' negligent misrepresentation claim fails to state a claim, and (D) that Plaintiffs' declaratory and injunctive relief claims fail to state a claim.

A. Home Affordable Modification Program

Before considering Defendant's arguments, it is helpful to review basic aspects of HAMP. The Emergency Economic Stabilization Act of 2008 ("EESA"), Pub.L. No. 110–343, 122 Stat. 3765, required the Secretary of the Treasury to implement a plan that would assist homeowners in avoiding foreclosure and encourage servicers of mortgages to minimize foreclosures. See 12 U.S.C. § 5219(a); Corvello v. Wells Fargo Bank, NA, 728 F.3d 878, 880 (9th Cir. 2013) (summarizing the history and elements of the EESA and HAMP). The Treasury Department in turn created HAMP, which provides incentives for banks to refinance mortgages to enable distressed homeowners to stay in their homes. Many home loan servicers signed Servicer Participation Agreements with the Treasury Department that required them to follow Treasury guidelines and procedures in return for compensation for each permanent mortgage modification achieved under HAMP. See Corvello, 728 F.3d at 880.

Under the Treasury Department guidelines in effect at the time of the facts at issue in this case, the process by which homeowners could seek loan modifications was as follows: Borrowers supplied to their servicer information about their finances and inability to pay their current mortgage. See Treasury Department Supplemental Directive 09-01 (Apr. 6, 2009). Based on this information, the servicer then determined whether the borrowers were eligible for a loan modification. Id. If so, the servicer prepared a Trial Period Plan ("TPP"), which required the borrowers to submit documentation to confirm the accuracy of their earlier representations and make trial payments of a modified amount to the servicer. Id. In the case of borrowers who made all of their payments and whose

representations remained accurate, the servicer was required to offer a permanent home loan modification. Id.

With this brief background, the court considers Defendant's asserted bases for dismissal of Plaintiffs' FAC.

B. Preemption Under the Fair Credit Reporting Act

Defendant argues that all seven of Plaintiffs' causes of action are preempted by the Fair Credit Reporting Act ("FCRA"). (See Motion at 4; Reply at 1.) Defendant contends that the only cognizable damages alleged by Plaintiffs is Plaintiff Marlo Desser's lost employment opportunity, which resulted from Defendant's reporting to credit agencies that Plaintiffs had defaulted on their loan. (See id.) Defendant argues that, because the FCRA bars state law claims against providers of credit information for providing inaccurate information to consumer credit reporting agencies, all of Plaintiffs' claims are preempted. (Id.)

Plaintiffs argue that, as an initial matter, Defendant's premise that Plaintiff has not alleged any cognizable damages unrelated to credit reporting is incorrect. (Opp. at 4.) It contends that "the true heart of Plaintiffs' grievances has nothing to do with U.S. Bank's reporting and instead focuses on U.S. Bank's breached promise to have the account deemed current upon finalizing the loan modification in their system." (Id.) The court agrees with Plaintiffs that, with respect to each cause of action, Plaintiffs have alleged damages that are unrelated to Defendant's negative credit reporting, including that Plaintiffs face the impending loss of their home through foreclosure and that they have incurred accrued interest and late charges. (See Opposition at 5; FAC ¶¶ (Damages) 36, 40 and ¶¶ (Causes of Action) 9, 10, 16, 29, 30, 31,

36, 38, 39, 53.) Defendant contends that Plaintiffs have not paid any interest or fees on their loan and that such damages are therefore fictitious. (Mot. at 4; Reply at 2.) However, the court agrees with Plaintiffs that accrued interest and fees need not have been paid at this time in order to constitute cognizable damages because they are liabilities incurred by Plaintiffs. As damages are alleged with respect to each cause of action that are unrelated to credit reporting, none of the claims will be dismissed in their entirety on the basis of FCRA preemption.[2]

However, FCRA preemption may serve to preempt portions of Plaintiffs' claims. Section 1681t(b)(1)(F), one of two preemption clauses in the FRCA and the one that is relevant here provides that, with some exceptions:

> No requirement or prohibition may be imposed under the laws of any State ... with respect to any subject matter regulated under ... section 1681s–2 ... relating to the responsibilities of persons who furnish information to consumer reporting agencies.

15 U.S.C. § 1681t(b)(1)(F) (emphasis added). Section 1681s–2, in turn, prohibits furnishers of credit information from reporting information they know or have reasonable cause to believe is inaccurate and requires them to correct and update information determined to be inaccurate or incomplete. See 15 U.S.C. § 1681s-2(a)-(b).

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[2] Plaintiffs also contend that their being forced to hire attorneys to vindicate their rights presents additional cognizable damages. (Opp. at 5.) However, as Defendant points out, Plaintiffs have not pointed in their FAC to any provision of the loan modification agreement providing for attorney's fees. (Reply at 2.) The court therefore does not recognize attorney's fees as a form of cognizable damages in this case. However, this does not affect the court's preemption analysis, since other damages unrelated to the credit reporting have been alleged.

Although FCRA preemption is an area of law in flux, there is strong support for the view that the FCRA preempts "claims for relief [] based on state laws relating to activity covered by Section 1681 s–2, that is, conduct relating to a furnisher's responsibilities to provide accurate information and conduct reasonable investigations following a dispute." Subhani v. JPMorgan Chase Bank, Nat. Ass'n, 2012 WL 1980416 (N.D. Cal. June 1, 2012) (providing thorough review of cases). Courts have generally held that state statutory or common law claims alleging damages related to a furnisher's disclosure of inaccurate credit information are preempted. See, e.g., Roybal v. Equifax, 405 F. Supp. 2d 1177, 1181 (E.D. Cal. 2005) ("Because Plaintiffs' State Claims [including, *inter alia*, negligent misrepresentation and common law negligence] are based on alleged injury arising purely from the reporting of credit information by a furnisher of credit, they are completely preempted.") (citing cases); Davis v. Maryland Bank, 2002 WL 32713429, at 13-14 (N.D. Cal. June 19, 2002) (finding FCRA preempted claims for negligence, defamation, intentional interference with prospective economic advantage and intentional infliction of emotional distress to the extent that they arose from improper investigation and disclosure of inaccurate credit information.) Accordingly, the tort claims asserted by Plaintiffs here, fraudulent misrepresentation and negligent misrepresentation, are preempted to the extent that these claims assert damages resulting from Defendant's reporting to a credit agency of inaccurate information concerning the status of Plaintiffs' loan.

However, the causes of action asserted by Plaintiffs that sound in contract must be addressed separately. On this issue, the

court finds Judge Carter's analysis of FCRA preemption in Rex v. Chase Home Fin. LLC, 905 F. Supp. 2d 1111, 1152 (C.D. Cal. 2012) instructive. In Rex, the plaintiff-borrowers carried out "short sales" of their homes--sales in which the sale price is insufficient to pay off the mortgage--and eschewed other options such as foreclosure in reliance on promises by the defendant bank to release the plaintiffs from the obligation to pay the short sale deficiency. Id. at 1119. When the bank did not release the plaintiffs but instead sought to collect the short sale deficiency and reported the plaintiffs' failure to pay the deficiency to credit reporting agencies, the plaintiff brought suit alleging various claims, including breach of contract. The court concluded that the breach of contract claim was not preempted because the FCRA's preemption clause "prohibits only legal duties 'imposed under the laws of any State,' whereas requirements voluntarily assumed by contract are not imposed under state law." Rex, 905 F. Supp. 2d at 1152 (quoting Leet v. Cellco P'ship, 480 F.Supp.2d 422, 432 (D. Mass. 2007) (denying motion to dismiss because a "breach of contract claim is not preempted by the FCRA") (internal quotation marks omitted).[3] Under this reasoning, which this court finds

[3] In reaching this conclusion, the court also relied on Kavicky v. Wash. Mut. Bank, F.A., 2007 WL 1341345, at *2 (D.Conn. May 5, 2007) ("[T]he FCRA does not preempt breach of contract claims."); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 515, 525–26 (1992) (holding that provision in 15 U.S.C. § 1334(b) stating that "[n]o requirement or prohibition ... shall be imposed under State law with respect to the advertising or promotion of" a product did not preempt a claim for breach of express warranty because such a claim is "imposed by the warrantor" and "common understanding dictates that a contractual requirement, although only enforceable under state law, is not 'imposed' by the State, but rather is 'imposed' by the contracting party upon itself"); Spencer v. Nat'l City Mortg., 831 F.Supp.2d 1353, 1356, 1364 (continued...)

persuasive, the claims asserted by Plaintiffs that sound in contract--breach of contract, implied covenant of good faith, and promissory estoppel–-are not preempted under Section 1681t(b)(1)(F), even to the extent that they assert damages related to the disclosure of credit information.

Defendant argues that Rex stands for the proposition that breach of contract claims are immune from FCRA preemption only where there are additional allegations unrelated to credit reporting to support the claim and that Plaintiffs have made no such allegations in this case. (Reply at 3 (citing Rex, 905 F.Supp.2d at 1150).) This argument is unsuccessful because, as discussed above, the court finds that Plaintiffs have made viable allegations of damages unrelated to credit reporting.

In sum, the court finds that none of Plaintiffs' claims are preempted completely. The claims that sound in tort--fraudulent misrepresentation and negligent misrepresentation--are preempted to the extent that they assert damages based on Defendant's credit reporting.

B. Breach of Contract and Implied Covenant of Good Faith

Defendant makes several arguments in support of its position that Plaintiffs' breach of contract and breach of the implied covenant claims must be dismissed.[4]

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[3](...continued)
(N.D.Ga. 2011) (holding that the FCRA did not preempt claim, despite plaintiff's allegation "she suffered approximately $116,997 in damages as a result of [defendant's] false negative reporting to the [credit reporting agencies]"). See Rex, 905 F. Supp. 2d at 1152.

[4] None of the arguments presented by the parties in their briefing papers specifically reference Plaintiffs' implied covenant (continued...)

First, Defendant argues that the breach of contract claim is based on conduct which "does not violate the express terms of the contract (i.e. the Trial Period Plan)." (Mot. at 5.) In particular, Defendant notes that Plaintiffs have not pointed to contract language stating that Defendant agreed to modify Plaintiffs' loan by a certain date or explain any reason for any perceived delay on its part. (Id.)

Plaintiffs respond by asserting that the contract at issue is not the TPP, but the Loan Modification Agreement sent to Plaintiffs by Defendant on November 19, 2009, which specified a "Modification Effective Date" for the loan of October 1, 2009. (Opp. at 5 (citing FAC Ex. C); FAC at 12-13.) Plaintiffs contend that they accepted the Agreement by sending in a notarized signed copy of the Agreement on December 2, 2009 and, after being informed that Defendant did not receive this communication, sending their signed Agreement in again in March 2010. (FAC ¶¶ 17, 23.)

Plaintiffs are correct. In the circumstances, Plaintiffs' acceptance of the Agreement was all that was required to create a contract. Defendant makes no argument to the contrary. The court notes that the Agreement contains the following text: "I understand that the loan Documents will not be modified unless and until (1) I receive from the Lender a copy of this Agreement signed by the Lender, and (II) the Modification Effective Date . . . has occurred." (FAC Ex. C, Loan Modification Agreement, at ¶ 2(B).) The second condition is met because Modification Effective Date had already passed when the Agreement was sent to Plaintiffs. While

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[4](...continued)
claim.

there is no representation by either party that Defendant ever provided a signed version of the Agreement to Plaintiffs, the language quoted above from ¶ 2(B)(II) of the Agreement is not an obstacle to finding the creation of a binding agreement. As a California appeals court recently noted in construing identical language in a loan modification agreement, concluding that no contract was formed because Defendant did not return a signed copy of the Agreement would violate basic principles of contract interpretation, including that the court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable. See Barroso v. Ocwen Loan Servicing, LLC, 208 Cal. App. 4th 1001, 1013 (2012). Such an interpretation would allow the servicer to avoid any obligations simply by failing to return a signed agreement. Id. See also Corvello, 728 F.3d at 883 (concluding that a similar provision in a TPP impermissibly "made the existence of any obligation conditional solely on action of the bank," allowing the bank to "avoid their obligations to borrowers merely by choosing not to send a signed Modification Agreement") (quoting Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012)). Therefore, the court concludes that a contract was formed establishing a modified loan with terms effective as of October 1, 2009.

Plaintiffs contend that Defendant breached the Agreement by attempting to collect mortgage payments in amounts different from those specified in the Agreement until December 2010. Specifically, they note that the Agreement altered the monthly amount to $2,084.49 at an interest rate of 2%. (Opp. at 5.) Plaintiffs contend that Defendant failed to comply with these commitments by

continuing to bill Plaintiffs at $2,853.35 per month and 6% interest until December 2010. (Id.) Defendant responds that the mortgage statements do not reflect any breach because such statements "would not reflect a new or different payment until and unless a permanent loan modification is granted." (Reply at 4.) However, as just discussed, a permanent loan modification was "granted" when Defendant sent Plaintiffs the Loan Modification Agreement, which, as noted stated an effective date of October 1, 2009. Once Plaintiffs accepted the Agreement, Defendant was bound to comply with its terms.

Second, Defendant argues that Plaintiffs ultimately did modify the terms of Plaintiffs' loan in January 2011, and thus Plaintiffs' claims cannot be based on any purported failure to send Plaintiffs a final loan modification agreement or to honor the terms of the Agreement. (Mot. at 5-6.) Although Plaintiffs do not specifically address this argument, their position appears to be in part that the mortgage statements reflecting a modified loan beginning in January 2011 do not constitute performance of the Agreement because these changes were made 15 months after the effective date of the Agreement (and 10 months from the date Plaintiffs sent in a signed copy of the Agreement for a second time) during which time their loan continued to accrue interest at a rate higher than the rate stated in the Agreement. The court agrees that this could constitute failure to perform on the part of Defendant resulting in damages to Plaintiffs.

Plaintiffs additionally contend that Defendant breached a contractual obligation when it failed, in issuing mortgage statements reflecting a loan modification beginning in January

2011, to bring their account current. Plaintiffs argue that they followed the instructions of Defendant's representatives in not making payments based on the understanding that the delay would not prejudice them as their account would be brought current when the modification was ultimately processed by Defendant. (Opp. at 6.) Defendant argues that Plaintiffs' factual assertions in this respect are false because "U.S. Bank Home Mortgage would not advise a mortgagor to default on their loan." (Opp. at 2 (quoting FAC Ex. H (Letter from Defendant to Plaintiff, Jan 24, 2013).) However, on a motion to dismiss, this court is required to accept a plaintiff's factual allegations as true; disputing the truth of Plaintiffs' allegations is not a basis for dismissing the claim. Fed. R. Civ. P. 12(b)(6).

However, Plaintiffs' alleged promise to bring their account current when their loan modification was ultimately processed is not a viable basis for a breach of contract claim for a different reason: Plaintiffs have not identified any valid contractual commitment to support such a claim. The Agreement itself includes only a commitment to make Plaintiffs' account current as of the Agreement's "Modification Effective Date," which was October 1, 2009. See Agreement ¶ 3(B). Plaintiffs appear to contend that Defendant's representatives' oral communications amount to a modification of the Agreement. However, such an oral modification would not be effective in the circumstances alleged because it would not satisfy California's statute of frauds, which requires that certain types of contracts be in writing to have legal effect. See Cal. Civ. Code § 1624. The statute of frauds is applicable here because a mortgage for real property is within its provisions, see

Cal. Civ. Code §§ 1624(a)(3) and 2922, and "an agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds." Secrest v. Sec. Nat. Mortgage Loan Trust 2002-2, 167 Cal. App. 4th 544, 553 (2008). Because there is no writing reflecting an agreement to bring Plaintiffs' account current as of the date that it completed processing of the loan modification, no valid modification of the Agreement to this effect occurred. This conclusion means that Plaintiffs' breach of contract claim is limited to only damages Plaintiffs can prove without reference to Defendant's alleged oral promises.

Defendant's third argument is that Plaintiffs' allegation that Defendant refused to provide "re-worked" modification terms or a second loan modification fails to state a claim because a lender has no duty to modify a loan. (Mot. at 6 (citing Stebley v. Litton Loan Servicing, LLP, 202 Cal. App. 4th 522, 526 (2011) (finding no duty to modify loan under Cal. Civ. Code section 2923.5). In response, Plaintiff contends that Defendant did modify the loan but failed implement the terms of its own agreement. (Opp at 6.) For the reasons stated above, the court agrees with Plaintiff that it may assert breach of contract claim arising from commitments made by Defendant in the original Agreement, but not based on Defendant's alleged oral promises. The court states no opinion as to the viability of Plaintiffs' promissory estoppel claim, which is based on the same oral representations.

Fourth, Defendant contends that Plaintiffs have failed to allege any damages from the purported breaches related to the modification of their loan. The court does not agree. As discussed above, Plaintiffs have alleged various potentially viable damages,

including accrued interest and late payment fees, as well as the impending loss of their home through a noticed foreclosure sale.

Finally, Defendant contends that the breach of contract claim should be dismissed because tort damages are not recoverable in this context. (Mot. at 6.) Defendant provides no elaboration and the subject of Defendant's argument is not clear to the court.

C. Negligent Misrepresentation

Defendant argues that Plaintiffs failed to state a claim for negligent misrepresentation. (Mot. at 6.)

Negligent misrepresentation is "a species of the tort of deceit." Bily v. Arthur Young & Co., 3 Cal. 4th 370, 407 (1992). The elements of the tort are "(1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce the plaintiff's reliance, (4) ignorance of the truth and justifiable reliance by the plaintiff, and (5) damages." See Fox v. Pollack, 181 Cal.App.3d 954, 962 (1986). To prevail on their claim of negligent misrepresentation, Plaintiffs must establish that Defendant owed them a duty of care. See Bily 3 Cal. 4th at 408-414; Nutmeg Sec., Ltd. v. McGladrey & Pullen, 92 Cal. App. 4th 1435, 1444 (Ct. App. 2001).

Plaintiffs' negligent misrepresentation claim rests on their allegations that they repeatedly called Defendant for updates and expressed concern that by not making payments they would jeopardize their pending HAMP modification and lose their home to foreclosure, but they were repeatedly given false assurances by Defendant's representatives that their loan modification was "pending final reset"; "not to worry" because they would not be penalized for not

making payments because Defendant was going to "reset" their loan modification; and that they were not in danger of losing their home. (FAC at 16.)

Defendant argues that Plaintiffs have not stated a negligent misrepresentation claim because Defendant does not owe Plaintiffs a duty of care. Defendant relies on Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096 (1991) for the proposition that "as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." Id. at 1096. Defendant cites various cases declining to impose a duty of care in negligence claims brought by homeowners against banks on the basis of this general rule. See Mot. at 5 (citing, inter alia, Rangel v. DHI Mortgage Co., Ltd., 2009 WL 2190210, at *3 (E.D. Cal. July 21, 2009) (declining to impose a duty of care in negligence claim where the plaintiff alleged that he was "placed into a loan that [was] inappropriate for her personal financial circumstances"); Watts v Decision One Mortg., 2009 WL 2044595, at *2-3 (S.D. Cal. July 13, 2009) (declining to find a duty of care in the context of negligent infliction of emotional distress claim where the plaintiff failed to allege any facts suggesting such a duty); Wagner v. Benson, 101 Cal. App. 3d 27, 35 (Ct. App. 1980) (declining to find duty of care for negligence claim where the plaintiffs alleged that the defendant-bank loaned money to them, as inexperienced investors, for a risky venture.)

As Plaintiffs note, however, the Nymark rule is not absolute. In California, determining whether a financial institution owes a

duty of care to a borrower-client involves a 6-factor test. The court must consider "[1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." Nymark, 231 Cal.App.3d at 1098 (citing Biakanja v. Irving, 49 Ca.2d 647 (1958)).

The balance of these factors suggests that a duty of care was owed by Defendant under the circumstances as alleged by Plaintiffs. First, the loan modification transaction was plainly intended to affect Plaintiff, as it would determine whether they are able to keep their home. Second, it was foreseeable that Plaintiffs' alleged reliance on Defendant's representations that their account would be brought current would cause harm to Plaintiffs by precipitating their default and the potential loss of their home. Third, harm to Plaintiffs arising from Defendant's alleged conduct is likely in that Defendant has already initiated a foreclosure sale (which is stayed pending this action) and Plaintiffs have alleged harm in the form of accrued interest and late payment charges and a lost employment opportunity. Fourth, such harm can be attributed directly to Defendant's alleged conduct.

The court does not have a sufficient basis to reach a conclusion as to the fifth factor, concerning whether moral blame is attached to Defendant's alleged conduct.

Finally, discouraging lenders from making representations that would lead borrowers to default is consistent with the federal

government's policy of facilitating loan modifications as established through HAMP and various recent state-level reforms aimed at the same goal. See, e.g., Cal. Civ. Code § 2923.6 (establishing a scheme that encourages lenders to offer loan modifications to borrowers).

On balance, the court concludes that Plaintiffs' allegations, accepted as true, are sufficient to create a duty of care on the part of Defendant for the purposes of Plaintiffs' negligent misrepresentation claim.

This conclusion is consistent with the holdings of several cases where courts have found that a lending institution owed a duty of care to borrowers arising from the lender's conduct in processing an application for a loan modification. See Robinson v. Bank of Am., 2012 WL 1932842, at *7 (N.D. Cal. May 29, 2012) (holding that bank owed the plaintiff-borrower a duty of care for purposes of negligence action where the "defendant-lender executed and breached the modification agreement, then engaged in a series of contradictory and somewhat misleading communications with plaintiff—in person, in writing, and by phone—regarding the status of his loan"); Ansanelli v. JP Morgan Chase Bank, N.A., 2011 WL 1134451, at *7 (N.D. Cal. Mar. 28, 2011) (finding a duty of care where the bank-defendant allegedly "went beyond its role as a silent lender and loan servicer to offer an opportunity to plaintiffs for loan modification and to engage with them concerning the trial period plan," but then reneged on a promise to modify the plaintiffs' loan and reported the loan as past due although plaintiffs made proper payments, damaging their credit rating); Watkinson v. MortgageIT, Inc., 2010 WL 2196083 (S.D. Cal. June 1,

2010) (finding that the defendant-bank owed a duty of care in processing the plaintiff's loan application where the "Defendant overstated Plaintiff's income and the value of the Property on the loan application, knowing that both of those were false"); Garcia v. Ocwen Loan Servicing, LLC, 2010 WL 1881098, at *1-3. (N.D. Cal. May 10, 2010) (finding duty of care in processing loan application for purposes of negligence claim where the defendant-bank lost the plaintiff's loan application documents).

D. Declaratory and Injunctive Relief

Defendant contends that Plaintiffs' demand for declaratory and injunctive relief fails because there is no viable substantive basis for such relief. As Defendant asserts, both forms of relief are viable only where independent claims supporting such relief are viable. See, e.g.,Padayachi v. Indymac Bank, 2010 WL 1460309 (N.D. Cal. Apr. 9, 2010) (plaintiff "may not maintain a claim for declaratory relief unless one of his other claims survives the motion to dismiss"); Santos v. Countrywide Home Loans, 2009 WL 3756337 (E.D. Cal. Nov. 6, 2009) ("Declaratory and injunctive relief are not independent claims, rather they are forms of relief." Shell Oil Co. v. Richter, 52 Cal. App. 2d 164, 168, 125 P.2d 930 (1942) ("Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted."). Defendant argues that Plaintiffs' demands for declaratory and injunctive relief must be dismissed because their predicate causes of action must be dismissed. (Mot. at 8.) This argument fails because, for the reasons discussed above, the court will not dismiss the underlying causes of action.

Defendant additionally argues that Plaintiffs' request for a declaration that Defendant has an obligation to permanently modify their loan must be dismissed because Plaintiffs concede that Defendant has already modified their loan and Plaintiffs thus "already have the very thing they seek." (Id.) This argument is unsuccessful because Plaintiffs contend that the terms of the modification they ultimately received were inconsistent with Defendant's alleged promises.

Finally, Defendant argues that Plaintiffs' demand for an injunction preventing Defendant from foreclosing on their home should be dismissed because Defendant has already stayed foreclosure during the pendency of this proceeding. (Id.) While this argument speaks to the lack of any need for a preliminary injunction (for which Plaintiff has not filed any motion), Defendant's point does not address the viability of Plaintiffs' request for injunctive relief following a final resolution on the merits.

Plaintiffs' FAC is deficient in that its requests for declaratory and injunctive relief are set out in separate causes of action rather than in the prayer for relief. However, in the interest of expediting this litigation, the court will construe Plaintiffs' demand for such relief as part of the prayer for relief rather than require Plaintiffs to file a second amended complaint solely for this purpose.

IV. Conclusion

For the reasons stated herein, Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint is GRANTED IN PART AND DENIED

IN PART as follows: Plaintiffs' negligent misrepresentation and fraudulent misrepresentation claims are preempted by the FCRA to the extent that they assert damages resulting from Defendant's reporting to credit reporting agencies. Defendant's motion to dismiss is denied all other respects.

IT IS SO ORDERED.

Dated: August 27, 2014

DEAN D. PREGERSON
United States District Judge