

1 portions of the FAC (Docket No. 19).¹

2 I. Factual Background

3 Plaintiffs are co-owners of a property in Placer County
4 subject to a loan. (FAC ¶¶ 7-8.) Citibank is the lender and
5 Cenlar is the loan servicer. (Id. ¶¶ 14, 16.) Plaintiffs allege
6 that in April 2019, plaintiffs were advised by a Citibank
7 personal banker to pay their monthly mortgage in two payments and
8 that their second payment would not be deemed late as long as it
9 was received by Cenlar before the 15-day grace period ended.
10 (Id. ¶ 14.) Plaintiffs changed their monthly payment into bi-
11 monthly payments and allege the total amount of the two payments
12 per month exceeded the minimum monthly payment. (Id. ¶ 15.)

13 Plaintiffs noticed that Cenlar was applying early
14 payments to the loan principal and rejecting the second payments
15 as partial payments. (Id. ¶ 16.) On September 22, 2019,
16 Plaintiffs met with Gabriella Peter, the Financial Center
17 Operations Manager at a Sacramento branch of Citibank. (Id. ¶
18 17.) Peter connected plaintiffs with a Cenlar representative,
19 whose name and position is unknown. (Id.) Plaintiffs allege
20 that during this phone call, Cenlar, through its representative,
21 agreed to the following:

22 "A. Cenlar agreed to recharacterize all past payments
23 incorrectly applied to principal and apply them to
24 payments on the loan, to remove all negative credit
reporting and waive late fees.

25 ¹ Defendant Cenlar submitted a request for judicial
26 notice of the promissory note and deed of trust associated with
27 plaintiffs' loan. (Docket No. 18.) The court does not rely on
28 any of the items in the request in deciding Cenlar's motion, and
the items are already attached to plaintiffs' FAC. Therefore, the
request is DENIED AS MOOT.

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2 B. Plaintiffs agreed to immediately pay in excess of
3 \$4,400 for rejected payments along with a 'telephone
4 convenience fee' to bring the account up to date.

5 C. With the application of payments applied to
6 principal now reset as payments on the loan,
7 Plaintiff[s'] account would be paid current until
8 February 1, 2020."

9 (Id.)

10 Plaintiffs paid the \$4,400 and then reset their payment
11 schedule to once per month. (Id. ¶ 18.) In February 2020,
12 plaintiffs applied for a loan, through another lender, to close
13 escrow on the purchase of a new home. (Id. ¶ 19.) Plaintiffs'
14 loan was rejected due to Cenlar continuing to "misapply payments
15 and report late payments to credit." (Id.) Plaintiffs allege
16 that Cenlar continued to report the account as "past due" and
17 "posted monthly negative and derogatory credit on Plaintiffs'
18 credit reports." (Id.) Despite plaintiffs submitting disputes
19 to Cenlar, plaintiffs allege Cenlar continues "to report negative
20 credit and multiple missed mortgage payments." (Id. ¶ 20.)

21 II. Citibank's Motion to Dismiss

22 Plaintiffs' breach of contract, negligence, and
23 negligent misrepresentation claims against Citibank are based on
24 the September 22, 2019 phone call in which Cenlar agreed to
25 recharacterize past payments, remove negative credit, and waive
26 late fees. Plaintiffs' breach of contract claim relies solely on
27 defendants' failure to "perform pursuant to the terms of the
28 September 22, 2019 oral agreement." (Id. ¶ 27.) Plaintiffs'
negligence claim alleges that defendants breached their duty of
care "by failing to honor the terms of the September 22, 2019

1 oral agreement.” (Id. ¶ 33.) The alleged misrepresentations in
2 plaintiffs’ negligent misrepresentation claim are also based on
3 the September 22, 2019 phone call. (Id. ¶ 41.)

4 The FAC does not “contain sufficient factual matter,
5 accepted as true” to plausibly allege that Citibank agreed to
6 anything during the September 22, 2019 phone call. See Ashcroft
7 v. Iqbal, 556 U.S. 662, 678 (2009). The FAC states that
8 Citibank’s employee “assisted with contacting a Cenlar
9 representative,” (FAC ¶ 17), but does not contain any factual
10 allegations demonstrating what the Citibank representative said
11 or did during or after the call that would show Citibank’s
12 involvement in the purported September 22, 2019 agreement.

13 The FAC does not contain any factual allegations
14 pertaining to plaintiffs’ theory, identified in plaintiffs’
15 opposition, that Citibank ratified the alleged September 22, 2019
16 agreement. (Pls.’ Opp’n to Citibank at 4-5 (Docket No. 23).)
17 Plaintiffs vaguely allege that Citibank acted in conflict with
18 the terms of the alleged September 22, 2019 agreement, but
19 liability for those actions cannot be assessed without any
20 factual allegations showing that Citibank was a party to the
21 alleged September 22, 2019 agreement, was aware of it, or made
22 any representations during the call. (See, e.g., FAC ¶¶ 27, 33)

23 Accordingly, Citibank’s motion to dismiss must be
24 granted.

25 III. Cenlar’s Motion to Dismiss

26 A. Breach of Contract

27 Cenlar argues the alleged oral agreement on September
28 22, 2019 was an attempt to modify the mortgage loan by changing

1 the process for loan payments, and therefore falls within the
2 statute of frauds. (Cenlar's Mot. at 7.) Any agreement
3 concerning interest in real property is governed by the statute
4 of frauds and must be in writing and signed by the party against
5 whom the agreement is enforced. Cal. Civ. Code § 1624. Because
6 a mortgage loan is subject to the statute of frauds, any
7 modification to its terms is also subject to the statute of
8 frauds. See Secrest v. Sec. Nat'l Mortg. Loan Tr. 2002-2, 167
9 Cal. App. 4th 544, 553-54 (4th Dist. 2008); see also, e.g., Khan
10 v. CitiMortgage, Inc., 975 F. Supp. 2d 1127, 1137 (E.D. Cal.
11 Sept. 20, 2013) (O'Neill, J.) (citing Secrest for the same
12 proposition); Basham v. Pac. Funding Grp., No. 2:10-cv-96 WBS
13 GGH, 2010 WL 2902368, at *6 (E.D. Cal. July 22, 2010) (same).

14 Even assuming the oral agreement was covered by the
15 statute of frauds, the FAC alleges sufficient facts to support
16 plaintiffs' claim that Cenlar is estopped from asserting the
17 statute of frauds as a defense. Under California law, "where
18 assertion of the statute of frauds would cause unconscionable
19 injury, part performance allows specific enforcement of a
20 contract that lacks the requisite writing." In Re Marriage of
21 Benson, 36 Cal. 4th 1096, 1108 (2005). "[T]o constitute part
22 performance, the relevant acts must either unequivocally refer to
23 the contract . . . or clearly relate to its terms," which
24 "satisfies the evidentiary function of the statute of frauds."
25 Id. at 1109 (citations and quotations omitted).

26 Here, plaintiffs sufficiently plead part performance
27 and unconscionable injury. Plaintiffs allege they paid the
28 agreed upon \$4,400 and changed their payment schedule to once a

1 month in accordance with the agreement. (FAC ¶¶ 18, 19.)
2 Further, plaintiffs' allegation that Cenlar is still making
3 negative credit reports about plaintiffs, two years after the
4 purported agreement to stop, sufficiently establishes
5 unconscionable injury. (Id. ¶ 20.) Due to ongoing negative
6 credit reports, plaintiffs allege they were unable to obtain
7 approval for another loan. (Id. ¶ 29.)

8 Plaintiffs sufficiently allege facts supporting each
9 element of a contract claim under California law, and Cenlar does
10 not argue otherwise. See First Com. Mortg. Co. v. Reece, 89 Cal.
11 App. 4th 731, 745 (2d Dist. 2001) (listing elements for breach of
12 contract claim). Plaintiffs allege that the September 22, 2019
13 agreement constitutes a contract, and that plaintiffs performed
14 their part of the contract by making the necessary payments and
15 resetting their payment schedule. (FAC ¶¶ 22, 26.) Plaintiffs
16 allege Cenlar was in breach of the contract when it continued to
17 misapply payments, report negative credit, "threaten other legal
18 actions," and "engage[] in ongoing and constant harassment of
19 plaintiffs." (Id. ¶¶ 27-28.) Plaintiffs also sufficiently plead
20 resulting harm by alleging denial of another loan due to negative
21 credit. (Id. ¶ 29.)

22 Accordingly, Cenlar's motion to dismiss plaintiffs'
23 breach of contract claim will be denied.

24 B. Negligence

25 To prove a cause of action for negligence, plaintiff
26 must show a legal duty owed to plaintiff by the defendant.
27 Mendoza v. City of Los Angeles, 66 Cal. App. 4th 1333, 1339 (2d
28 Dist. 1998) (citation omitted). A lender or servicer owes no

1 duty of care in its "customary role in arms-length lending and
2 servicing." Id. at 635. Sheen v. Wells Fargo Bank, N.A., 12
3 Cal. 5th 905, 505 P.3d 625, 635 (2022).² Here, although
4 plaintiffs allege Cenlar owed them a "duty of care under the
5 circumstances" (FAC ¶ 32), plaintiffs do not sufficiently allege
6 what the "circumstances" are beyond those of Cenlar's customary
7 role in lending and servicing that call for a duty or even what
8 Cenlar had a duty to do.³

9 Moreover, even if plaintiffs sufficiently alleged the
10 duty element, the allegations do not overcome the economic loss
11 doctrine. Generally, "there is no recovery in tort for
12 negligently inflicted 'purely economic losses,' meaning financial
13 harm unaccompanied by physical or property damage." Sheen, 505
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15 ² Prior to Sheen, courts applied a factor test from
16 Biakanja v. Irving, 49 Cal. 2d 647, 650 (1958) to determine if
17 the situation fell outside the general rule cited above. However,
18 the California Supreme Court clarified in Sheen that the factors
19 in Biakanja only apply "when the plaintiff is a third party not
20 in privity with the defendant." Sheen, 505 P.3d at 642. Here,
21 it is alleged that plaintiffs and Cenlar were in contractual
22 privity pursuant to the initial loan agreement and the purported
23 September 22, 2019 agreement. Therefore, the court does not
24 apply the factors under Biakanja.

25 ³ See Chie v. Citigroup, Inc., No. 20-cv-07611, 2021 WL
26 633868, at *5 (N.D. Cal. Feb. 18, 2021) (holding that no duty of
27 care existed based on allegations that defendant had a duty to
28 "account for and credit or refund funds that were sent to"
defendant because defendant was "acting in its capacity as a
conventional lender"); Gosal v. Wells Fargo Bank, N.A., No. 2:18-
cv-00908 JAM AC (PS), 2018 WL 2984875, at *5 (E.D. Cal. June 14,
2018) (holding that plaintiff failed to sufficiently allege the
duty element because defendant was acting in its capacity as a
lending institution when "failing to properly and accurately
credit payments, preparing and filing false documents, and
foreclosing").

1 P.3d at 632. "[T]he rule functions to bar claims in negligence
2 for pure economic losses in deference to a contract between
3 litigating parties." Id. "[S]uch claims are barred when they
4 arise from -- or are not independent of -- the parties'
5 underlying contracts." Id. Plaintiffs' allegations are
6 insufficient to state a negligence claim independent of the
7 parties' contractual duties.

8 Accordingly, Cenlar's motion to dismiss plaintiff's
9 negligence claim will be granted.

10 C. Negligent Misrepresentation

11 "The elements of negligent misrepresentation under
12 California law are: '(1) the misrepresentation of a past or
13 existing material fact, (2) without reasonable ground for
14 believing it to be true, (3) with intent to induce another's
15 reliance on the fact misrepresented, (4) justifiable reliance on
16 the misrepresentation, and (5) resulting damage.'" Argueta v.
17 J.P. Morgan Chase, No. 2:11-cv-441 WBS GGH, 2011 WL 6012323, at
18 *4 (E.D. Cal. Dec. 1, 2011) (citing Apollo Cap. Fund, LLC v. Roth
19 Cap. Partners, LLC, 158 Cal. App. 4th 226, 243 (2d Dist. 2007)).

20 Plaintiffs fail to sufficiently allege a claim for
21 negligent misrepresentation that is distinct from their claim for
22 breach of contract. Plaintiffs only allege "misrepresentations"
23 that are promises Cenlar made as part of the purported
24 contractual agreement. (FAC ¶ 41.) These are not
25 misrepresentations of a "past or existing material fact," rather
26 they are allegedly false promises of future action, which cannot
27 form the basis for a negligent misrepresentation claim. See UMG
28 Recordings, Inc. v. Glob. Eagle Ent., Inc., No. CV 14-3466 MMM,

1 2015 WL 12746208, at *18 (C.D. Cal. Oct. 20, 2015) (citing
2 Tarmann v. State Farm Mut. Auto Ins. Co., 2 Cal. App. 4th 153,
3 158 (6th Dist. 1991)) (“California law does not recognize a claim
4 for negligent misrepresentation on the basis of a false
5 promise”). Therefore, Cenlar’s motion to dismiss plaintiffs’
6 negligent misrepresentation claim will be granted.

7 D. Fair Credit Reporting Act Preemption

8 Cenlar argues that to the extent that plaintiffs’
9 remaining breach of contract claim is based on inaccurate
10 reporting, it is preempted by the Fair Credit Reporting Act
11 (“FCRA”), 15 U.S.C. § 1681. The FCRA provides that “[n]o
12 requirement or prohibition may be imposed under laws of any state
13 . . . with respect to any subject matter regulated under . . .
14 section 1681s-2 . . . relating to the responsibilities of persons
15 who furnish information to consumer reporting agencies.” 15
16 U.S.C. § 1681t(b)(1)(F). Section 1681s-2 requires furnishers of
17 credit, like Cenlar, to provide accurate information to consumer
18 reporting agencies. The Ninth Circuit has not defined the scope
19 of FCRA preemption.⁴

20 Courts reason that a breach of contract claim is not
21 preempted by Section 1681t(b)(1)(F) because that “provision
22 prohibits only legal duties ‘imposed under the laws of any
23

24 ⁴ In Gorman v. Wolpoff v. Abramson, LLP., 584 F.3d 1147,
25 1165-67 (9th Cir. 2009), the Ninth Circuit detailed the debate
26 over the scope of preemption pursuant to the FCRA, noting that
27 some courts find the FCRA only preempts state statutory claims
28 rather than state statutory and common law claims. However, the
Ninth Circuit did not opine on this issue because that case did
not require a decision on it.

1 State,' whereas requirements voluntarily assumed by contract are
2 not imposed under state law." Rex v. Chase Home Fin. LLC, 905 F.
3 Supp. 2d 1111, 1152 (C.D. Cal. Nov. 19, 2012) (collecting cases)
4 (quotations omitted); cf. Cipollone v. Liggett Grp., Inc., 505
5 U.S. 504, 515, 525-26, 526 n.24 (1992) (holding that the
6 preemption provision in 15 U.S.C. § 1334(b) stating that "no
7 requirement or prohibition . . . shall be imposed under state law
8 with respect to advertising and promotion of any cigarettes
9 . . ." did not preempt a claim for breach of express warranty
10 because such claim is "imposed by the warrantor" and "common
11 understanding dictates that a contractual requirement, although
12 only enforceable under state law, is not 'imposed' by the State,
13 but rather is 'imposed' by the contracting party upon itself").

14 Here, because Cenlar allegedly imposed upon itself the
15 requirement that it would stop inaccurately reporting negative
16 credit, the requirement was not imposed by state law. (FAC ¶
17 22.) Accordingly, plaintiffs' remaining breach of contract claim
18 is not preempted by the FCRA.

19 E. Punitive Damages

20 Cenlar moves to dismiss plaintiffs' request for
21 punitive damages alongside their negligence and negligent
22 misrepresentation claims. As discussed above, those claims will
23 be dismissed, and therefore, Cenlar's motion as to punitive
24 damages is moot.

25 IV. Cenlar's Motion to Strike

26 Cenlar's motion to strike seeks to strike paragraphs of
27 the FAC which are "improper argument and legal citations."
28 (Cenlar's Mot. to Strike at 1.) Rule 12(f) authorizes the court

1 to "strike from a pleading an insufficient defense or any
2 redundant, immaterial, impertinent, or scandalous matter." Fed.
3 R. Civ. P. 12(f). Because motions to strike are "often used as
4 delaying tactics," they are "generally disfavored" and are rarely
5 granted in the absence of prejudice to the moving party. Rosales
6 v. Citibank, FSB, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001).

7 To the extent that Cenlar's motion seeks to strike
8 paragraphs contained in the claims for negligence and negligent
9 misrepresentation, the motion is moot given the dismissal of
10 those claims. In regard to the remaining paragraphs Cenlar moves
11 to strike, Cenlar has not demonstrated any prejudice. See New
12 York City Emp. Ret. Sys. v. Berry, 667 F. Supp. 2d 1121, 1128
13 (N.D. Cal. Sept. 24, 2009) ("Where the moving party cannot
14 adequately demonstrate . . . prejudice, courts frequently deny
15 motions to strike even though the offending matter literally was
16 within one or more of the categories set forth in Rule 12(f)."
17 (citation and quotations omitted)). Accordingly, the court will
18 deny Cenlar's motion to strike. In so doing, the court expresses
19 no opinion about the merits of any legal conclusions plaintiffs
20 include in their FAC.

21 IT IS THEREFORE ORDERED that:

22 (1) Defendant Citibank's motion to dismiss (Docket No.
23 16) be, and the same hereby is, GRANTED;

24 (2) Defendant Cenlar's motion to dismiss (Docket No.
25 17) be, and the same hereby is, GRANTED with respect to
26 plaintiffs' negligence and negligent misrepresentation claims,
27 and DENIED as to plaintiff's breach of contract claim; and

28 (3) Defendant Cenlar's motion to strike (Docket No.

1 19) be, and the same hereby is, DENIED.

2 Plaintiffs have twenty days from the date of this Order
3 to file a second amended complaint, if they can do so consistent
4 with this Order.

5 Dated: April 25, 2022



6 WILLIAM B. SHUBB
7 UNITED STATES DISTRICT JUDGE
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