

1 moot after plaintiffs filed their first amended complaint (“FAC”) on July 17, 2009. *See*
2 Docs. # 12, 15. Plaintiffs’ FAC is the operative pleading here.

3 Plaintiffs allege in their FAC that they purchased their home by taking out a secured
4 loan and executing a deed of trust in May of 2006. FAC ¶¶ 12, 14. Plaintiffs further
5 allege that on a date unknown, Countrywide began acting as an agent for the beneficiary
6 of the loan and became the servicer of the loan. FAC ¶ 17. On April 17, 2009,
7 Countrywide and Fannie Mae entered into a Servicer Participation Agreement
8 (“Agreement”) for the Home Affordable Modification Program (“HAMP”), a government
9 program established pursuant to the Emergency Economic Stabilization Act of 2008,¹ that
10 is designed to promote loan modification and other foreclosure prevention services. *See*
11 FAC, Exhs. 1. Servicers obligations are set forth in the Agreement as well as in the
12 Guidelines established by the Department of the Treasury. *See* FAC, Exhs. 1-3.

13 Plaintiffs allege that when they attempted to secure a modification of their loan,
14 Countrywide would not provide them with a modification. FAC ¶ 20. Plaintiffs also
15 allege that, after they apparently stopped making payments, Countrywide began harassing
16 them in an attempt to collect payments on the loan. FAC ¶ 21. Plaintiffs assert five
17 claims for relief: (1) breach of written contract; (2) declaratory relief; (3) violation of
18 California’s Rosenthal Fair Debt Collection Practices Act (“RFDCPA”), Cal. Civ. Code
19 §1788, *et seq.*; (4) invasion of privacy; and (5) unfair business practices in violation of Cal.
20 Bus. & Prof. Code § 17200.

21 Defendant filed the instant motions on August 3, 2009. Plaintiffs filed an
22 opposition on September 17, 2009 and defendant filed a reply brief on September 22,
23 2009.² This Court subsequently took defendant’s motions under submission without oral

25 ¹ On March 4, 2009, President Obama signed into law the Making Home Affordable Plan as part
26 of the Emergency Economic Stabilization Act of 2008, which consists of two parts: the Home Affordable
Refinance Program and the HAMP.

27 ² In its reply brief, defendant urges the Court to disregard plaintiffs’ opposition to defendant’s
28 motion to dismiss because it was untimely filed, thus rendering the motions unopposed. *See* Doc. # 21 at 1.
Defendant points out that plaintiffs’ opposition, due by September 14, 2009, was filed three days late. *Id.*
Although defendant is correct that plaintiffs’ opposition is untimely, defendant was apparently not

1 argument. *See* Doc. # 23; CivLR 7.1(d.1).

2 DISCUSSION

3 Defendant moves to dismiss each claim for relief asserted in plaintiffs' FAC for
4 failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the
5 Federal Rules of Civil Procedure. In addition, defendant moves to strike certain portions
6 of plaintiffs' FAC pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

7 **I. Legal Standards**

8 **a. Motion to Dismiss**

9 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint.
10 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under
11 Rule 12(b)(6) where the complaint lacks a cognizable legal theory. Robertson v. Dean
12 Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); *see* Neitzke v. Williams, 490
13 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis
14 of a dispositive issue of law."). Alternatively, a complaint may be dismissed where it
15 presents a cognizable legal theory yet fails to plead essential facts under that theory.
16 Robertson, 749 F.2d at 534. While a plaintiff need not give "detailed factual allegations,"
17 he must plead sufficient facts that, if true, "raise a right to relief above the speculative
18 level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

19 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,
20 accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal,
21 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 547). A claim is facially
22 plausible when the factual allegations permit "the court to draw the reasonable inference
23 that the defendant is liable for the misconduct alleged." Id. In other words, "the non-
24 conclusory 'factual content,' and reasonable inferences from that content, must be
25 plausibly suggestive of a claim entitling the plaintiff to relief. Moss v. U.S. Secret Service,
26 572 F.3d 962, 969 (9th Cir. 2009). "Determining whether a complaint states a plausible

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prejudiced by the delay, in that its reply brief was timely filed. Therefore, plaintiffs' opposition will not be
disregarded.

1 claim for relief will ... be a context-specific task that requires the reviewing court to draw
2 on its judicial experience and common sense.” Iqbal, 129 S.Ct. at 1950.

3 **b. Motion to Strike**

4 Rule 12(f) of the Federal Rules of Civil Procedure grants a party the right to strike
5 any “insufficient defense or any redundant, immaterial, impertinent, or scandalous
6 matter.” “Immaterial” refers to a matter that has no bearing on the controversy before the
7 court. Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)(reversed on other
8 grounds in Fogerty v. Fantasy, Inc., 510 U.S. 517, 534-535). “Impertinent” matters
9 include allegations that are not responsive or relevant to the issues involved in the action.

10 Id.

11 **2. Analysis**

12 **a. Motion to Dismiss**

13 **1. Breach of Contract [First Claim for Relief]**

14 Plaintiffs seek relief based on their alleged status as third-party beneficiaries to the
15 Agreement between Countrywide and Fannie Mae. *See* FAC ¶ 39. Countrywide contends
16 that plaintiffs lack standing to sue because they are not intended third party beneficiaries
17 to the Agreement. This Court agrees with Countrywide.

18 Federal law governs the Agreement and thus the Agreement must be construed
19 under federal law. *See* FAC, Exh. 1 § 11A. In applying federal law regarding third-party
20 beneficiaries, the Ninth Circuit is guided by the Restatement of Contracts. *See* Klamath
21 Water Users Protective Ass’n v. Patterson, 204 F.3d 1206, 1210-11 (9th Cir. 2000). The
22 Restatement on Contracts explains that:

- 23 (1) Unless otherwise agreed between promisor and promisee, a beneficiary
24 of a promise is an intended beneficiary if recognition of a right to
25 performance in the beneficiary is appropriate to effectuate the intention of
26 the parties and . . .
27 (b) the circumstances indicate that the promisee intends to give the
28 beneficiary the benefit of the promised performance.
(2) An incidental beneficiary is a beneficiary who is not an intended
beneficiary.

Restatement (Second) of Contracts § 302 (1979) (“Restatement”).

1 “To sue as a third-party beneficiary of a contract, the third party must show that
2 the contract reflects the express or implied intention of the parties to the contract to
3 benefit the third party.” Klamath, 204 F.3d at 1211. “One way to ascertain such intent
4 is to ask whether the beneficiary would be reasonable in relying on the promise as
5 manifesting an intention to confer a right on him or her.” Id. (citing Restatement §
6 302(1)(b), comment d.). In Klamath, the Ninth Circuit cautioned that parties benefitting
7 “from a government contract are generally assumed to be incidental beneficiaries, and may
8 not enforce the contract absent a clear intent to the contrary.” Klamath, 204 F.3d at 1211
9 (citing Restatement § 313(2) (“Government contracts often benefit the public, but
10 individual members of the public are treated as incidental beneficiaries unless a different
11 intention is manifested.”)).

12 More recently, in County of Santa Clara v. Astra USA, Inc., 588 F.3d 1237 (9th
13 Cir. 2009), the Ninth Circuit explained that “[d]emonstrating third-party beneficiary
14 status in the context of a government contract is a comparatively difficult task” requiring
15 examination of the “precise language of the contract for a ‘clear intent’ to rebut the
16 presumption that the [third parties] are merely incidental beneficiaries.” Id. at 1244
17 (quoting Orff v. United States, 358 F.3d 1137, 1147 n.5 (9th Cir. 2004)). The Ninth
18 Circuit went on to determine, however, that the central question in this task is whether
19 the parties to the contract “intended to grant covered entities enforceable rights as
20 intended beneficiaries of that agreement” by looking at the “text and purpose” of the
21 contract as well as the governing statute and its purpose when the contract is mandated
22 by federal statute. Id. at 1245-46.

23 Here, the Agreement provides that:

24 1. Services.

25 A. Subject to the terms of Section 10.C., Servicer (defendant) shall
26 perform the loan modification and other foreclosure preventive services ...
27 described in (i) the Financial Instrument ...; and (iii) any supplemental
28 documentation, instructions, bulletins, letters, directives or other
communications, including ... compliance requirements, performance
requirements and related remedies, issued by the Treasury ... in order to
further ... describe or clarify the scope of the rights and duties of the
Participating Servicers in connection with the Program ... and together with

1 the Program Guidelines ...

2 FAC, Exh. 1 at 2. The Agreement further provides that:

3 B. Servicer's representations and warranties, and acknowledgment of and
4 agreement to fulfill and satisfy certain duties and obligations with respect to
5 its participation in the Program and under the Agreement are set forth in the
6 Financial Instrument.

6 Id. The Financial Instrument, attached as Exhibit A to the Agreement, contains the
7 following provisions: (1) "Servicer shall perform all services in consideration of the
8 Purchase Price in accordance with the terms and conditions of the Agreement, the
9 reasonable satisfaction of Fannie Mae or Freddie Mac;" (2) "Servicer shall use all
10 reasonable efforts to remove all ... impediments ... in order to effectuate any loan
11 modification under the Program;" (3) "Servicer covenants that ... all mortgage
12 modifications and all trial period modifications will be offered to borrowers, fully
13 documented and serviced in accordance with the Program Documentation;" and (4)
14 "Servicer covenants that it will ... perform the Services required under the Program
15 Documentation and the Agreement." Id.

16 The HAMP Guidelines dated March 4, 2009,³ attached to the FAC as Exhibit 2,
17 identify eligibility requirements for loan modifications, including qualification terms and
18 underwriting analysis, which provide that servicers are "required to consider all eligible
19 loans unless prohibited by the rules of the applicable pooling and servicing agreement
20 and/or other investor servicing agreements ... [and] use all reasonable efforts to remove any
21 prohibitions and obtain waivers or approvals from all necessary parties." FAC, Exh. 2 at 2.
22 The Guidelines further state that "[a]ny foreclosure action will be temporarily suspended
23 during the trial period, or while the borrowers are considered for alternative foreclosure
24 prevention options." Id. at 3.

25 A Summary of Guidelines issued by the United States Treasury, attached to the
26 Agreement as Exhibit 3, indicates that the Making Home Affordable Plan is designed to

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28 ³ This Court notes that the Agreement was executed on April 14, 2009. This Court infers that the
Guidelines, dated March 4, 2009, were incorporated into the Agreement at the time of its execution pursuant
to Paragraph 1.A.

1 “help[] prevent the destructive impact of foreclosures on families, communities and the
2 national economy.” FAC, Exh. 3. These Guidelines provide that the Home Affordable
3 Refinance Program will be available to 4 to 5 million homeowners who have a solid
4 payment history on an existing mortgage and the HAMP will help 3 to 4 million at risk
5 homeowners avoid foreclosures. Id.

6 In addition, the recitals that precede Paragraph 1 of the Agreement, incorporated
7 by reference in Paragraph 1.c., reflect that HAMP was established by the United States
8 Treasury and “includes loan modification and other foreclosure prevention services,”
9 stating specifically that Participating Servicers “must agree to certain terms and conditions
10 relating to the respective roles and responsibilities of Program participants.” FAC, Exh. 1
11 at 1. The recitals further state that defendant “wishes to participate in the program as a
12 Participating Servicer on the terms and conditions set forth [in the Agreement].” Id.

13 This Court finds the facts in Klamath analogous to the facts here. The Klamath
14 case involved a 50 year contract originally entered into in 1917 (and later extended for an
15 additional 50 years) pursuant to the Reclamation Act and “acts of Congress relating to the
16 preservation and development of fish and wildlife resources,” between the United States
17 Bureau of Reclamation (the “United States”) and the California Oregon Power Company
18 (“Copco”), the only named parties to the contract. Id. The contract provided that Copco
19 construct a dam and then reconvey it to the government. Id. at 1209. The contract also
20 gave Copco the right to operate the dam. Id. The dam was built to satisfy a number of
21 federal purposes and obligations, such as impounding water to flood adjacent wildlife
22 refuges, to comply with the Endangered Species Act and other federal requirements related
23 thereto, and in recognition of fishing and water treaty rights between the Secretary of the
24 Interior and a number of Oregon Tribes. Id. The Klamath Water Users Protective
25 Association and other irrigators in the Klamath Basin (collectively the “Irrigators”) sued
26 for breach of contract based on allegations that they have standing to sue on the contract
27 as third party beneficiaries to the contract between the United States and Copco. Id. at
28 1210. The Ninth Circuit held that, although a contract between the United States and

1 a dam operator operated to the Irrigators’ benefit and was “undoubtedly entered into with
2 the Irrigators in mind,” there was nothing in the contract demonstrating an intention of
3 the parties to the contract to grant the Irrigators enforceable rights. Id. at 1211-12. The
4 Ninth Circuit explained that “to allow them intended third-party beneficiary status would
5 open the door to all users receiving a benefit from the Project achieving similar status, a
6 result not intended by the Contract.” Id. at 1212.

7 Similarly, here, the Agreement here was entered into in part for the benefit of
8 qualified borrowers and with those borrowers in mind but the language of the contract
9 does not demonstrate a clear intent by the parties to grant qualified borrowers the right
10 to enforce the Agreement. In fact, the Agreement specifies that it “shall inure to the
11 benefit of . . . the parties to the Agreement and their permitted successors-in-interest.”
12 FAC, Exh. 1 § 11.E. Plaintiffs fail to point to any language in the Agreement indicating
13 the parties clearly intended to benefit qualified borrowers by entering into the Agreement.
14 This Court’s independent review has found no language in the Agreement which would
15 rebut the presumption that qualified borrowers are merely incidental beneficiaries to the
16 Agreement.

17 Qualified borrowers such as plaintiffs here cannot reasonably rely on a manifested
18 intent to confer rights upon them since the Agreement does not require that Countrywide
19 modify all eligible loans. *See Escobedo v. Countrywide Home Loans, Inc.* 2009 WL
20 4981618 *3 (S.D.Cal. Dec. 19, 2009); *see also Burtzos v. Countrywide Home Loans*, 2009
21 WL 2196068 * 2 (S.D.Cal. June 1, 2010). Instead, the Agreement here sets forth HAMP
22 guidelines based on certain eligibility requirements, stating that: “[p]articipating servicers
23 are required to consider all eligible loans under the program guidelines unless prohibited
24 by the rules of the applicable PSA and/or other investor servicing agreements.” FAC,
25 Exh. 2 at 2. The Agreement does not state that Countrywide must modify all mortgages
26 that meet the eligibility requirements only that it is required to consider them. Thus, this
27 Court finds that qualified borrowers such as plaintiffs are only incidental beneficiaries of
28 the Agreement and do not have enforceable rights under the contract. Therefore, plaintiffs

1 lack standing to sue for an alleged breach of the Agreement⁴ and defendant's motion to
2 dismiss is **GRANTED** as to this claim.

3 **2. Declaratory Relief [Second Claim for Relief]**

4 Defendant contends that plaintiffs' declaratory relief claim is duplicative of their
5 breach of contract claim. In opposition, plaintiffs agree to forgo this claim in favor of their
6 breach of contract claim. Therefore, this Court **GRANTS** defendant's motion to dismiss
7 this claim.

8 **3. RFDCPA [Third Claim for Relief]**

9 Defendant contends that plaintiffs' RFDCPA claim should be dismissed because
10 plaintiffs have failed to allege sufficient facts to support such a claim. This Court disagrees
11 with defendant. Although plaintiffs' FAC is not very detailed, it sufficiently alleges
12 harassing conduct that would violate California Civil Code §1788.11(d), (e) and §
13 1788.17 (by violating 15 U.S.C. § 1692b(2), (6)). Plaintiffs allege that Countrywide
14 representatives continuously made telephone calls to plaintiffs and allege that although
15 Countrywide was provided with the name and phone number of plaintiffs' attorney,
16 Countrywide representatives continued to contact and harass plaintiffs. FAC ¶¶ 21-23.
17 In addition, plaintiffs allege that Countrywide failed to provide the notice required by Cal.
18 Civ. Code § 1812.700. FAC ¶ 49(d). There is little else that can be pled with respect to
19 a failure to give notice. This Court finds that plaintiffs have alleged sufficient facts to
20 support a claim under the RFDCPA. Therefore, defendant's motion to dismiss is **DENIED**
21 as to this claim.

22 **4. Invasion of Privacy [Fourth Claim for Relief]**

23 Defendant seeks to dismiss plaintiffs' invasion of privacy claim on the ground that
24 plaintiff has not alleged facts establishing (1) a sufficiently serious invasion of his privacy
25 interest; and (2) damages. The essential elements of a claim for invasion of privacy are:
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27 ⁴ Although HAMP was enacted by Congress with the intent to aid distressed homeowners in this
28 volatile economic climate, *see* FAC, Exh. 3 at 2, it appears to this Court that the statute does not provide
homeowners with the right to enforce agreements made pursuant to it. Unfortunately, the remedy for this
conundrum is with Congress, not this Court.

1 (1) the defendant intentionally intruded upon the solitude or seclusion, private affairs or
2 concerns of the plaintiff; (2) the intrusion was substantial, and of a kind that would be
3 highly offensive to an ordinarily reasonable person; and (3) the intrusion caused plaintiff
4 to sustain injury, damage, loss or harm. Cal. BAJI 7.20.

5 Repeated phone calls may rise to the level of an intrusion of privacy that supports
6 a cause of action. *See Joseph v. J.J. MacIntyre Companies, LLC.*, 238 F. Supp. 2d 1158,
7 1169 (N. D. Cal. Dec. 12, 2002) (holding that given the number and pattern of telephone
8 calls alleged, there was a genuine issue of fact as to whether the plaintiff's privacy was
9 invaded). As discussed above, plaintiffs have alleged facts regarding repeated and
10 continuous calls. These facts support a plausible claim of a substantial invasion of privacy
11 that would be offensive to a reasonable person.

12 As for damages, plaintiffs allege that as a result of the invasions of privacy, they
13 "were harmed and caused great mental and physical pain." FAC ¶ 58. This Court finds
14 this allegation sufficient to satisfy the element of damages. *See Miller v. National*
15 *Broadcasting Co.*, 187 Cal. App. 3d 1463, 1484-85 (1986) (explaining that where there
16 is a wrongful invasion of privacy, damages may be recovered for mental anguish alone).
17 Accordingly, defendant's motion to dismiss is **DENIED** as to plaintiffs' invasion of privacy
18 claim.

19 **5. Cal. Bus. & Prof. Code § 17200 [Fifth Claim for Relief]**

20 Defendant further contends that plaintiffs' § 17200 claim fails because it is
21 premised on plaintiffs' other claims, which fail to state a claim. However, because
22 plaintiffs' RFDCPA and invasion of privacy claims withstand the instant motion to
23 dismiss, this Court finds defendant's argument unavailing. Therefore, defendant's motion
24 to dismiss this claim is **DENIED**.

25 **b. Motion to Strike**

26 Defendant also moves to strike plaintiffs' prayer for punitive damages and punitive
27 damage allegations on the ground that plaintiffs have failed to plead facts establishing that
28 defendant's acts were oppressive, fraudulent, or malicious and have failed to plead facts

1 establishing that defendant, as a corporate employer, is liable for any acts of oppression,
2 fraud or malice. However, under federal pleading requirements, malice and intent may be
3 averred generally. Clark v. Allstate Ins. Co., 106 F. Supp. 2d 1016, 1020 (S. D. Cal.
4 2000). “[T]he fact that California courts may impose a heightened pleading requirement
5 on claims for punitive damages is irrelevant, because such a requirement conflicts with
6 federal procedural law.” Robinson v. Managed Accounts Receivable Corp., 654 F. Supp.
7 2d 1051, 1066 (C.D. Cal. 2009). Conclusory assertions of intentional and malicious
8 misconduct are sufficient to support a claim for punitive damages. Clark, 106 F. Supp. 2d
9 at 1020. Plaintiffs allege that defendant “willfully and intentionally intruded into
10 [p]laintiffs’ solitude, seclusion and private affairs by repeatedly and unlawfully attempting
11 to collect a debt” and that defendants “acted with oppression or malice.” FAC ¶¶ 55, 58.
12 These allegations are sufficient under federal pleading standards. Therefore, defendant’s
13 motion to strike is **DENIED**.

14 CONCLUSION AND ORDER

15 Based on the foregoing, IT IS HEREBY ORDERED that:

16 1. Defendant’s motion to dismiss [doc. # 17] is **GRANTED IN PART** and
17 **DENIED IN PART** as follows:

- 18 a. Defendant’s motion is **GRANTED** as to plaintiffs’ first claim for
19 breach of contract and second claim for declaratory relief;
20 b. Defendant’s motion is **DENIED** as to plaintiffs’ third, fourth, and
21 fifth claims for relief; and

22 2. Defendant’s motion to strike plaintiffs’ punitive damages allegations [doc.
23 # 18] is **DENIED**.

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25 DATED: June 28, 2010

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JOHN A. HOUSTON
United States District Judge