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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GEORGE L. SCHILLING and SHU Y.
SCHILLING,

Plaintiffs,

v.

JPMORGAN CHASE & CO. d/b/a JP
MORGAN CHASE BANK, N.A.;
TRANSUNION, LLC; EXPERIAN
INFORMATION SOLUTIONS INC.; and
EQUIFAX INC.,

Defendants.

Case No. C17-0060RSM

ORDER DENYING DEFENDANT’S
MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on Defendant JPMorgan Chase’s Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). Dkt. #16. Defendant seeks to dismiss Plaintiffs’ claims under the Federal Credit Reporting Act (“FCRA”) and the Washington Consumer Protection Act (“CPA”). Defendant argues that Plaintiffs’ FCRA claim fails as a matter of law because: (1) Plaintiffs cannot claim their debt was settled through a short pay off, and (2) Plaintiffs failed to allege that Defendant received a notice of dispute, a prerequisite for liability under FCRA. *Id.* Defendant also attacks Plaintiffs’ CPA claim, arguing that: (1) FCRA preempts CPA claims, and (2) Plaintiffs’ pleadings merely parrot the elements of a state law CPA claim. Dkt. #16 at 13-18.

1 Plaintiffs respond that their claims should not be dismissed because: (1) Defendant
2 accepted a payment to settle Plaintiffs' debt, constituting accord and satisfaction, so reporting the
3 debt as "charged off" is inaccurate; (2) the Complaint sufficiently alleges the "notice" element of
4 a FCRA claim; (3) their CPA claim is not preempted because the conduct giving rise to their state
5 law claim is separate from their FCRA claim, and (4) they have adequately pled elements of a
6 CPA claim. Dkt. #23.

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8 For the reasons set forth below, the Court agrees with Plaintiffs and DENIES Defendant's
9 Motion.

10 II. BACKGROUND

11 Prior to the financial crisis, Plaintiffs George and Shu Schilling obtained a second
12 mortgage loan from Washington Mutual for \$230,000. Dkt. #1 at ¶ 10. Defendant JPMorgan
13 Chase acquired the loan after Washington Mutual failed in 2008.¹ *Id.* After health issues arose,
14 Plaintiffs fell behind on their payments. Dkt. #1 at ¶ 11. In 2015, Defendant initiated negotiations
15 by sending offers to Plaintiffs to settle the balance of the debt for less than they owed. *Id.*
16 Specifically, on September 23, 2015, Defendant sent Plaintiffs a letter offering to "greatly reduce
17 the remaining balance of \$190,950.89 on your account, so it's easier for you to settle this account
18 once and for all." Dkt. #1-2 at 49. Defendant's offer listed three figures:

- 21 • One-Time Payment of \$26,642.63 (Payoff Date: October 27, 2015)
- 22 • Monthly Payments of \$2,592.00 (Payoff Date: November 1, 2016)
- 23 • Monthly Payments of \$992.00 (Payoff Date: November 1, 2018)

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27 ¹ Plaintiffs bring their FCRA claims against this Defendant in its capacity as a credit "furnisher."
28 Dkt. #1 at ¶ 2. Defendant admits it is a credit "furnisher" as defined by FCRA. Dkts. #16 at 11
and #1 at ¶ 2.

1 Defendant's offer further stated: "Once your settlement payoff is complete, we'll release any
2 remaining lien(s) we may hold on the property and notify the credit reporting agencies that the
3 balance has been resolved." Dkt. #1-2 at 49. Defendant's letter explicitly states that it constituted
4 a "valid offer that ends on October 27, 2015." *Id.*

5 On October 15, 2015, Plaintiffs' counsel informed Defendant of his representation and
6 faxed Defendant a letter proposing to tender \$10,000.000 in exchange for Defendant's release
7 and conveyance of Plaintiffs' Deed of Trust. Dkts. #1 at ¶ 12 and #1-2 at 15.²

8 On October 21, 2015, Defendant sent a letter to Plaintiffs' counsel acknowledging that
9 Plaintiffs had retained counsel. Dkt. #1-2 at 83. However, Defendant did not address the
10 counteroffer included in Plaintiffs' October 15, 2015, letter. *Id.*

11 On October 26, 2015, Plaintiffs' counsel submitted a cashier's check in the amount of
12 \$10,000.00. Dkt. #1 at ¶ 12. Counsel expressly specified the payment was made "in consideration
13 for Chase releasing the note and re-conveyance of the Deed of Trust associated with the Loan's
14 account number XXXXX." *Id.* and #1-2 at 18. Defendant cashed the check immediately on
15 October 28, 2015, Dkt. #1-2 at 18, and did not provide any additional notation or protest on the
16 face of the check itself. *Id.*

17 The parties do not dispute that Defendant has since reported the debt as "charged off"
18 rather than paid off by a compromised amount. Dkt. #1 at ¶ 17. Plaintiffs' Complaint cites to
19 Experian's website for the definition of "charged off," which means "that the original creditor
20 has given up on being repaid according to the original terms of the loan. It considers the remaining
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26 ² Specifically, the Letter states:

27 "Mr. & Mrs. Schilling propose to tender ten thousand dollars (\$10,000.00) by October 31,
28 2015 in consideration for Chase releasing the note and conveyance of the Deed of Trust
associated with account number XXXX."
Dkts. #1 at ¶ 12 and #1-2 at 15 and 49.

1 balance to be bad debt, but that doesn't mean you no longer owe the amount that has not been
2 repaid." Dkt. #1 at ¶ 28. Having been "charged off" by the original lender, the account is generally
3 sent to a collection agency, which will then attempt to recover the remaining amount and
4 potentially additional interests and fees. *Id.*

5 After depositing Plaintiffs' check, Defendant continued reporting the debt as "charged
6 off," and continued to issue debt collection demands to Plaintiffs, including almost daily
7 collection calls. Dkt. #1 at ¶ ¶ 13 and 17. Over the course of the following months, Plaintiffs
8 sent Defendant multiple letters disputing Defendant's reporting of the debt as "charged off" rather
9 than paid off by settlement, and requesting investigation, which went unanswered by Defendant.³
10 Plaintiffs allege at least two of these written disputes were sent to Trans Union, Experian and
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16 ³ Specifically, these contacts include:

- 17 • In March of 2016, pursuant to RCW 31.04.290, Plaintiffs' counsel issued to Defendant a
18 written request seeking detailed information regarding the payment Plaintiffs made and
19 how it applied to the Loan. *Id.* at ¶ 14.
- 20 • Plaintiffs' counsel sent another letter in April of 2016, specifically requested the re-
21 conveyance of their deed of trust, with citations to Washington laws, and exhibits
22 documenting payment of the compromised amount. *Id.* at ¶ 15, Dkt. #1-2 at 29.
- 23 • Plaintiffs re-sent the same package of information in September of 2016. Dkt. #1 at ¶ 16.
- 24 • Plaintiff George Schilling sent Defendant a written dispute in February of 2016 to
25 challenge Defendant's reporting of the debt as "charged off" rather than paid off by a
26 compromised amount. *Id.* at ¶ ¶ 17 and 18. He specified that Defendant's reporting of the
27 mortgage loan being charged off is inaccurate because the account was settled for less
28 than the full amount. *Id.* He also asked Defendant to "reinvestigate this matter and correct
the disputed item as soon as possible." *Id.* Schilling also sent this letter to Trans Union,
Experian and Equifax, *id.*, the three entities Plaintiffs' Complaint alleges are "credit
reporting agencies" within the meaning of FCRA, 15 U.S.C. 1681a(f). *Id.* at ¶ ¶ 3, 4 and
5.
- Plaintiff Shu Schilling separately sent her written dispute to Defendant in February of
2016 containing the same request for reinvestigation and correction of the reported item
as George Schilling's written dispute. *Id.* at ¶ 19. She too sent a letter to the three credit
reporting agencies. *Id.*

1 Equifax, *id.*, the three entities Plaintiffs' Complaint alleges are "credit reporting agencies" within
2 the meaning of FCRA. *Id.* at ¶ 3, 4 and 5.

3 III. DISCUSSION

4 A. Legal Standard

5 Rule 12(b)(6) permits a court to dismiss a complaint for failure to state a claim. Fed. R.
6 Civ. P. 12(b)(6). The Rule requires the Court to assume the truth of the Complaint's factual
7 allegations, credit all reasonable inferences arising from those allegations, and resolve doubts in
8 favor of the plaintiff. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007).

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10 The plaintiff must point to factual allegations that "state a claim to relief that is plausible
11 on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). A defendant's motion should
12 be denied when there is "any set of facts consistent with the allegations in the complaint" that
13 would entitle the plaintiff to relief, *id.* at 563; *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), "even
14 if it strikes a savvy judge that actual proof of those facts is improbable." *Twombly*, 550 U.S. at
15 556.
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18 A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims alleged in the
19 complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Dismissal of the
20 complaint, or any claim within it, may be based on either a "'lack of a cognizable legal theory' or
21 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside*
22 *Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police*
23 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). Thus, this Court must determine whether Plaintiffs
24 have stated a plausible legal claim, not whether they will be successful on the merits of such
25 claim. This standard bears repeating because Defendant largely concentrates on the merits of
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1 Plaintiffs' claim, rather than focusing on the 12(b)(6) standard. This Court analyzes this motion
2 in a manner consistent with the Rule 12(b)(6) standard.

3 As a general rule, the Court may not consider any material beyond the pleadings and
4 attached exhibits. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). Because
5 neither party has asked the Court to consider materials beyond the four corners of the Complaint
6 and Exhibits attached thereto, the Court does not depart from the general rule.
7

8 **B. Plaintiff's FCRA Claim: Inaccuracy**

9 As noted above, Defendant admits it is a "furnisher" as defined by FCRA. "Furnishers"
10 are sources that provide credit information to credit reporting agencies. *Gorman v. Wolpoff &*
11 *Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009). Under FCRA, "furnishers" have the duty
12 to investigate and/or correct inaccurate information, and an individual may bring a private cause
13 of action to sue a furnisher for its failure to fulfill those duties. 15 U.S.C. § 1681s-2(b); *Nelson*
14 *v. Chase Manhattan Mortg. Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002). In order to state such a
15 claim under FCRA, Plaintiffs must, "at a minimum," allege: (1) factual content showing an
16 inaccuracy in their credit report; and (2) that they communicated their disputes to the credit
17 reporting agencies ("CRAs"). *Gorman*, 584 F.3d at 1154, 1162.
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20 With respect to the "inaccuracy" element, Plaintiffs allege that Defendant reported their
21 debt to three CRAs as "charged off" rather than paid off by a compromised amount, and that this
22 reporting is inaccurate as of October 2015 when Plaintiffs satisfied the debt by tendering the short
23 pay off amount of \$10,000.00. Dkt. #1 at ¶ 17. In other words, Plaintiffs assert that their payoff
24 constituted accord and satisfaction of their debt. Thus, if Plaintiffs have plausibly alleged accord
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1 and satisfaction under Washington contract law, they have also adequately pled the “inaccuracy”
2 element of their FCRA claim.⁴

3 Under Washington law, the doctrine of “accord and satisfaction” recognizes a debtor and
4 creditor’s agreement to settle a claim by some performance that differs from that which is claimed
5 due—once the creditor accepts the substituted performance, it amounts to full satisfaction of the
6 claim. *Northwest Motors, Ltd. v. James*, 118 Wash. 2d 294, 303 (1992) (en banc). If the substitute
7 agreement is consummated, it supersedes the original contract. *Northwest Motors*, 118 Wash. 2d
8 305; *Evans v. Columbia Int’l Corp.*, 3 Wash. App. 955, 957 (1970). The three essential elements
9 for an accord and satisfaction are: (1) the existence of a bona fide dispute; (2) an agreement to
10 settle the dispute; and (3) performance of the agreement. *Ward v. Richards & Rossano, Inc.*, 51
11 Wash. App. 423, 429 (1988).
12

13 14 *1. Bona Fide Dispute*

15 Defendant first argues there can be no accord and satisfaction because the amount of debt
16 Plaintiffs owed was never in dispute. Dkt. #16 at 10.⁵ Plaintiffs respond that the Defendant’s
17 offers to settle the balance of the debt for “pennies on the dollar” rendered the amount owed
18 uncertain, unliquified, or disputed. Dkt. #23 at 9. Specifically, Plaintiffs point out that
19 Defendant’s letter – sent only weeks before Plaintiffs made their counteroffer and tendered their
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22 ⁴ Plaintiffs assert a novel legal theory here, and Rule 12(b)(6) dismissals are especially disfavored
23 in such cases. See *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004) (explaining
24 that a court should be “especially reluctant to dismiss on the basis of the pleadings when the
25 asserted theory of liability is novel or extreme, since it is important that new legal theories be
explored and assayed in the light of actual facts rather than a pleader’s suppositions”) (internal
citations omitted).

26 ⁵ Interestingly, Defendant presents two different amounts for the “undisputed” balance owed prior
27 to Plaintiffs tendering their \$10,000.00 check. Compare Dkt. #16 at 10 (“[T]here was no dispute
28 they owed \$180,000. . .”) with *id.* at 14 (“The April 2015 statement and the September 23, 2015
[sic] indicate that the unpaid principal balance was \$190,950.89.”). Thus, Defendant’s own
motion raises questions as to the amount actually owed.

1 check – explicitly offers to reduce the remaining balance on Plaintiffs’ account and contains three
2 different amounts. *See* Dkts. #1 at 3 and #1-2 at 49 (“We’re offering to greatly reduce the
3 remaining balance of \$190,950.89 on your account.”). For the reasons discussed herein, the Court
4 agrees with Plaintiffs.

5 Where the amount owed is in dispute, acceptance of a lower amount by the creditor
6 constitutes an accord and satisfaction. *Field Lumber Co. v. Petty*, 9 Wash. App. 378, 379 (1973).
7 However, if the amount owed is not in dispute, then there can be no accord and satisfaction
8 without proof of additional consideration. *Id.* at 378, 380. Likewise, “[w]hen there is a dispute
9 between the debtor and the creditor as to the amount due, one claiming that a certain sum is due
10 and the other claiming that another sum is the proper amount, the demand is unliquidated, within
11 the meaning of that term as applied to accord and satisfaction.” *Paulsen Estate, Inc. v. Naches—*
12 *Selah Irr. Dist.*, 190 Wash. 205, 208 (1937).

13 Taking all factual allegations as true, the Complaint and attached Exhibits give rise to an
14 inference that there was a bona fide dispute over the amount owed on the debt. At the time
15 Plaintiffs made their counteroffer and then tendered their check, they had been provided three
16 different pay off amounts, all lower than \$190,950.89, the acceptance of any of which would have
17 resolved their debt. At the least, the debt was uncertain.

18 Defendant argues that Plaintiffs’ Complaint does not actually allege that the amount owed
19 was uncertain. Dkt. # 24 at 6. While it is true that Plaintiffs’ Complaint does not use the words
20 “the debt was uncertain,” the Complaint as written provides adequate notice to the Defendant of
21 Plaintiffs’ theory. *See* Dkt. #1 at ¶ 17 (alleging Defendant reported Plaintiffs’ debt as “charged
22 off” rather than paid off by a compromised amount even though Plaintiffs satisfied the debt by
23 tendering the short pay off amount of \$10,000.00).

1 Defendant further argues that even if there was a dispute, the parties disputed the amount
2 of the settlement offer, not the amount of the outstanding balance. Dkt. #24 at 6. But Defendant
3 is drawing a distinction without a difference. See *First Nat'l Bank v. White-Dulaney Co.*, 123
4 Wash. 220, 224 (1923) (internal citations omitted). The Washington Supreme Court has long
5 held that when the parties agree on the amount of debt owed, but the debtor has an offset or claim
6 against the creditor, the debt owed is considered disputed. *First Nat'l Bank v. White-Dulaney*
7 *Co.*, 123 Wash. 220, 224 (1923). Similarly, when the parties agree on the amount of the debt
8 owed, but there is a dispute about the debtor's right to a set-off or counter claim, the claim as a
9 whole is rendered disputed. *Id.* The reason for this is simple: "[T] here is no material difference
10 between a dispute directly involving the claim itself and a dispute involving an offset against the
11 claim; that whatever may be the ground of the dispute the fact remains that there is one." *Id.*

14 Finally, for the first time in its reply brief, Defendant questions Plaintiffs' good faith belief
15 that there was a dispute about *any* amount. Dkt. #24 at 6. Since "[i]t is well established that new
16 arguments . . . presented for the first time in Reply are waived," *DocuSign, Inc. v. Sertifi, Inc.*,
17 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006), the Court will not address this argument.

19 2. *The Agreement to Settle*

20 Defendant next argues that it did not agree that "only \$10,000 was due and owing – so
21 payment of that sum is not a full settlement." Dkt. #16 at 10. The "accord" is the agreement
22 between debtor and creditor to settle a claim by some performance other than what is due, and
23 "satisfaction" refers to the performance of the accord. *Dep't of Fisheries*, 25 Wash. App. at 676.
24 Where, as here, the amount owed is alleged to be disputed or unliquidated, the agreement to settle
25 the dispute may be implied from surrounding circumstances. *U.S. Bank Nat'l Ass'n v. Whitney*,
26 119 Wash. App. 339, 350 (2003). A key circumstance is the creditor's acceptance of a draft
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1 tendered in full payment of the debt, creating the contract binding on both parties. *Dep't of*
2 *Fisheries*, 25 Wash. App. at 676; *Or. Mut. Ins. Co. v. Barton*, 109 Wash. App. 405, 413 (2001).

3 Further, the parties need not expressly bargain to establish the accord. Rather, Washington
4 courts have found that the parties' agreement can be shown when the debtor offers payment
5 accompanied by conduct from which the creditor cannot fail to understand that payment is
6 tendered on the condition its acceptance constitutes satisfaction. *U.S. Bank Nat'l Ass'n v. Whitney*,
7 119 Wash. App. 339, 351 (2003).⁶ A plaintiff need not establish the creditor "knew the legal
8 result of their acceptance of the check, as the mere acceptance will be regarded as assent." *First*
9 *Nat'l Bank v. White-Dulaney Co.*, 123 Wash. 220, 224 (1923).

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11 For example, in *Oregon Mutual Insurance Company v. Barton*, accord and satisfaction
12 existed when an insured deposited a settlement check given to him by his insurance company in
13 "full settlement" of his claim for a burned tractor, and the check was accompanied by a letter from
14 the insurance company confirming the settlement. 109 Wash. App. at 410. In that case, Oregon
15 Mutual Insurance Company accused its insured, George Barton, of arson, but only after it had
16 agreed to a settlement, issued the settlement drafts along with a proof of loss statement, and after
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20 ⁶ As the Washington Supreme Court has written, Washington adheres to the objective
21 manifestation theory of contracts when it comes to ascertaining the mutual intentions of
22 contracting parties:

23 "This theory imputes an intention to a person which corresponds to the reasonable
24 meaning of that person's words and acts . . . Petitioner's unexpressed impressions
25 are meaningless when attempting to ascertain the mutual intentions of the parties.
26 When Petitioner James tendered the \$3,596.42 check to Respondent Northwest, he
27 did not protest the repair costs nor the amount stated on the invoice. He did not
28 express his intent to negotiate on the costs at a later time. His internalized subjective
intent to object does not meet the objective manifestation test this court adopted in
Dwellely."

Nw. Motors, Ltd. v. James, 118 Wash. 2d 294, 302-03, (1992) (internal citations omitted).

1 Mr. Barton had negotiated the drafts. *Id.* at 409. It then sued to void the settlement agreement
2 with Mr. Barton. *Id.* at 409. The Court found that the insurance company and Barton had reached
3 an accord and satisfaction, and because an accord cuts off all defenses and arguments based on
4 the underlying contract, Oregon Mutual could not void the settlement agreement. *Id.* at 419.

5 In contrast, Washington courts have found no accord and satisfaction where the notation
6 “full and final payment” was a pro forma notation made on every business check in typeface too
7 small to be read easily, *see Kibler v. Frank L. Garrett & Sons, Inc.*, 73 Wash. 2d 523, 528 (1968)),
8 or where testimony from both the debtor and the creditor showed the payment was accepted on
9 specific disavowal that an accord was being created. *See U.S. Bank*, 119 Wash. App at 344, 351.
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11 As was the case in *Oregon Mutual*, Plaintiffs in this case have alleged a letter accompanied
12 their settlement check. *See* Dkt. #1 at 3. Specifically, the letter specifies the payment is “in
13 consideration for Chase releasing the note and re-conveyance of the Deed of Trust associated with
14 the Loan’s account number XXXXX.” Dkt. #1-2 at 18. Unlike the parties in *Kibler*, Plaintiffs
15 here signaled their intent to offer \$10,000.00 to settle the debt a week prior to tendering their
16 check and accompanying confirmation letter. Dkts. #1 at 3 and #1-2 at 18 and 49. Unlike the
17 parties in *U.S. Bank*, Plaintiffs here were *responding* to an offer initiated by Defendant and
18 explicitly called their payment to Defendant’s attention. Therefore, Plaintiffs’ Complaint and
19 attached Exhibits detail conduct akin to that in which Washington courts have found accord and
20 satisfaction, and the Court finds that Plaintiffs have adequately pled an agreement to settle.
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23 3. *Performance: Satisfaction*

24 Defendant does not address the “satisfaction” element of accord and satisfaction. Thus,
25 the Court finds that Plaintiffs have adequately alleged the element. A creditor can accept payment
26 and avoid formation of an accord only where both parties understand before payment is accepted
27 that the payment will not settle the claim. *U.S. Bank*, 119 Wash. App. at 344, 351 (finding no
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1 accord and satisfaction where testimony from *both* parties showed the creditor “accepted the
2 check on the clear understanding that no accord had been reached” and that tender “was not
3 conditioned on” acceptance of the debtor’s accounting). Here, Plaintiffs allege: (1) they actually
4 tendered payment, as evidenced by the image of the check in Dkt. #1-2 at 20; (2) they tendered
5 payment on the understanding that an agreement had been reached, as evidenced by Dkt. #1-2 at
6 18; and (3) Defendant accepted the payment unconditionally and cashed the check immediately.
7 *See* Dkts. #1 at ¶ 12 and #1-2 at 18. Therefore, Plaintiffs have sufficiently alleged the third
8 element of accord and satisfaction under Washington law.
9

10 For all of these reasons, Plaintiffs have sufficiently alleged all elements of “accord and
11 satisfaction,” and therefore have also adequately pled the “inaccuracy” element of their FCRA
12 claim.
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14 4. *Statute of Frauds*

15 Finally, Defendant argues that because an accord and satisfaction would alter pre-existing
16 loan documents, it would violate the Credit Agreement Statute of Frauds, RCW 19.36.110, and
17 therefore Plaintiffs’ FCRA claim fails as a matter of law. Dkt. #16 at 11 (“The Schillings’
18 counteroffer is thus not a modification of their obligation.”). For this argument to succeed,
19 Defendant would need to demonstrate that (1) the Credit Agreement Statute of Frauds is
20 applicable; and (2) enforcing the Statute of Frauds precludes Plaintiffs’ claim. Defendant fails to
21 meet this burden for several reasons.
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23 First, the language of the statute⁷ renders it “inapplicable, since no one is seeking to
24 enforce the credit agreement ‘against the creditor.’” *See Robinett v. Opus Bank*, 987 F. Supp. 2d
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27 ⁷ “A credit agreement is not enforceable against the creditor unless the agreement is in writing
28 and signed by the creditor.” RCW 19.36.110.

1 1099, 1102 (W.D. Wash. 2013). Rather, Plaintiffs' FCRA claim focuses on a *furnisher's* liability
2 for investigating inaccuracies in a consumer's report, a claim that requires a showing of an
3 "inaccuracy." Plaintiffs have not sought to enforce the accord and satisfaction they allege exists,
4 they simply use it as a basis for their theory of FCRA liability.

5 Second, Plaintiffs argue that the Statute of Frauds does not apply because the case does
6 not involve a modification of the terms of the loan or the Defendant extending credit, rather, it
7 involves Defendant's attempt to "clear its book of a debt that might not be repaid at all." Dkt.
8 #23 at 12. Defendant responds that this is indistinguishable from modifying the terms of the loan,
9 but provides no legal authority to support that assertion.⁸ Dkt. #24 at 8.

10 Defendant also appears to assert that any agreement to accept Plaintiffs' counteroffer must
11 have been in writing and signed by both parties to be enforceable. Dkt. #24 at 8. As an initial
12 matter, Defendant's offer, Plaintiffs' counteroffer and the letter accompanying the tendered check
13 were all in writing. Dkts. #1 at 3 and #1-2 at 18 and 49. More importantly, the cases upon which
14 Defendant relies are factually distinguishable from the instant case.

15 Defendant first relies on *Patrick v. Wells Fargo Bank, N.A.*, 196 Wash. App. 398 (2016),
16 which centered on a creditor's *oral* statements to a debtor, promising to increase the debtor's loan
17 amounts and not to call in his loan. *Id.* at 252. Defendant cites to a footnote that simply reiterates
18 that loan modification agreements must be in writing under the Credit Agreement Statute of
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24 ⁸ In fact, in other cases, courts have construed the Statute of Frauds narrowly. In *Robinett v. Opus*
25 *Bank*, 987 F. Supp. 2d 1099, 1104 (W.D. Wash. 2013), for example, the Court declined to apply
26 the credit agreement statute of frauds to the borrower's claims that the bank had misrepresented
27 that their lending relationship would continue, concealing the fact that the bank had no intention
28 of remaining in the real estate development loan business. *Id.* The Court explained that the bank's
offers were "not contractual promises (or 'oral agreements to loans money, extend credit, [or]
forbear from enforcing repayment'), but instead [we]re representations (upon which Plaintiffs
allegedly relied) that a business relationship will continue." *Id.*

1 Frauds. The case does not stand for the proposition that the counteroffer must be signed by both
2 parties.

3 Defendant also points to *Union Bank, N.A. v. Blanchard*, 194 Wash. App. 340, 355 (2016),
4 which involved guarantors asserting that a lender made promises to extend them a loan as
5 allegedly evidenced by “risk assessment reports” (some of which acknowledged the possibility
6 that borrower will need additional credit in order to stay current on loan payments) and a “loan
7 memorandum.” *Id.* The Court found that the guarantors’ reliance on those documents as proof
8 of purported promises was barred by the statute of frauds, reasoning that the documents the
9 guarantors relied on had not been signed one of the lender’s representatives and *did not actually*
10 *contain promises.* *Id.* In this case, (1) the Defendant’s initial offer was sent by a specific
11 representative of Defendant; (2) Plaintiffs’ counteroffer and the letter accompanying the tendered
12 check are signed by Plaintiffs’ counsel; (3) Plaintiffs’ check, with the words “Paid in Full” written
13 on it, was endorsed and deposited by Defendant. Taken as a whole, these documents contain the
14 signatures of both parties. Thus, at this stage of the proceedings, Defendant has not demonstrated
15 that enforcing the Credit Agreement Statute of Frauds precludes Plaintiffs’ claims as a matter of
16 law.
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20 **C. Plaintiff’s FCRA Claim: Notice of Dispute to Defendants**

21 Defendant also argues that Plaintiffs’ FCRA claim should be dismissed because “they do
22 not allege the credit reporting agencies contacted Chase” regarding Plaintiffs’ dispute. Dkt. #16
23 at 12. The Court is not persuaded by Defendant’s argument.
24

25 Section 1681s–2(b) of FCRA imposes several duties on “furnishers,” like Defendant,
26 which provide credit information to credit reporting agencies. *Gorman*, 584 F.3d at 1153.
27 Specifically, a furnisher shall:
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- 1 (A) conduct an investigation with respect to the disputed information;
2 (B) review all relevant information provided by the [CRA] pursuant to section
3 1681i(a)(2) ...;
4 (C) report the results of the investigation to the [CRA];
5 (D) if the investigation finds that the information is incomplete or inaccurate, report
6 those results to all other [CRAs] to which the person furnished the information ...; and
7 (E) if an item of information disputed by a consumer is found to be inaccurate or
8 incomplete or cannot be verified after any reinvestigation under paragraph (1) ... (i)
9 modify ... (ii) delete ... [or] (iii) permanently block the reporting of that item of
10 information [to the CRAs].

11 An individual may bring a private cause of action for a furnisher's failure to fulfill these duties.
12 *Nelson*, 282 F.3d at 1060. However, a furnisher's duties to investigate and correct inaccurate
13 information are triggered only upon notice of dispute. *Gorman*, 584 F.3d at 1154. (“[N]otice of
14 a dispute received directly from the consumer does not trigger furnishers' duties under subsection
15 (b).”). So it is only after (1) a consumer notified a credit reporting agency of an inaccuracy, (2)
16 the agency has notified the furnisher, and (3) the furnisher has failed to take action, that a
17 consumer may sue the furnisher. *Id.* ⁹

18 Stating a claim under FCRA requires a plaintiff to allege the furnisher's duties were
19 triggered, and the furnisher's duties are triggered upon notice from the CRAs of the consumer's
20 dispute. *Gorman*, 584 F.3d at 1154, 1162. In an unpublished decision, the Ninth Circuit reiterated
21 that a plaintiff must, “at a minimum, [] allege factual content showing . . . that he communicated
22 his disputes to the credit reporting agencies (“CRAs”).” *Banks v. ACS Educ.*, 638 F. App'x 587,
23 590 (9th Cir. 2016). *See also McDonald v. OneWest Bank*, No. C10-1952RSL, 2012 WL
24 12878776, at *1 (W.D. Wash. Apr. 19, 2012) (allowing the plaintiff to amend his complaint
25 because plaintiff had notified credit reporting agencies of his dispute and credit reporting agencies
26 are required to provide notice of the dispute to the furnishers under 15 U.S.C. § 1681i(a)(2)(A));

27 _____
28 ⁹ FCRA provides that a party may recover actual damages for negligent violations of the statute,
15 U.S.C. § 1681o, and both actual and punitive damages for willful violations of the statute, 15
U.S.C. § 1681n(a).

1 *Keetch v. Saxon Mortg. Servs*, No. 13-CV-0332-JLQ, 2013 WL 5945798, at *3 (E.D. Wash. Nov.
2 6, 2013) (“Plaintiffs’ alleged receipt of correspondence from the CRAs stating the dispute had
3 been “researched,” “reinvestigated,” or “verif[ied]” with “the creditor” is more than sufficient to
4 suggest the plausibility of contact with the furnisher.”).

5 Defendant relies on *Tuttle v. Bank of N.Y. Mellon*, a case in which this Court granted
6 defendants’ motion to dismiss (and found an amended complaint would be futile) because the
7 plaintiff had “not alleged *any* facts to support the conclusion that Defendants received a notice of
8 a dispute from any credit reporting agency, which could trigger Defendants’ duty to investigate.”
9 No. C11-1048-RSM, 2012 WL 726969, at *3 (W.D. Wash. Mar. 6, 2012) (emphasis added). This
10 Court explained that it would be improper to infer that defendants received such a notice “based
11 *solely* on Plaintiff’s assertion that he disputed the debt to credit reporting agencies” because “the
12 Court cannot know whether the credit reporting agency, upon receiving Plaintiff’s complaint,
13 determined that Plaintiff had failed to provide sufficient information to investigate the disputed
14 information, or that Plaintiff’s dispute was frivolous, and terminated the reinvestigation, or
15 whether it conducted the reinvestigation and alerted the furnishers of the dispute.” *Id.* (emphasis
16 added).

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20 *Tuttle* is distinguishable from the instant matter. Unlike the minimal allegations made in
21 *Tuttle*, the Complaint here alleges that Plaintiffs sent multiple written inquiries to Defendant
22 Chase and the CRAs (Defendants Experian, Equifax, and Trans Union) during February 2016.
23 Dkt. #1 at ¶¶ 18 and 19. The letters both requested investigation and a correction to Defendant’s
24 listing the mortgage loan as “charged off” because it had been settled for less than the full amount.
25 *Id.* Significantly, Defendant Equifax indicated that the dispute had been researched and affirmed
26 by the creditors – i.e. Defendant Chase – stating, “creditor has verified to OUR company” that
27
28

1 the prior payment history and current balance were being reported accurately. *Id.* at ¶ 20. Thus,
2 the Court draws the reasonable inference that the CRAs notified Defendant of the dispute.

3 Further, requiring plaintiffs to formally allege a furnisher received a notice of dispute from
4 a CRA – rather than simply requiring plaintiffs to allege sufficient factual content from which to
5 make that inference – might set the bar too high. “Indeed, this is a fact a plaintiff may not be able
6 to plead at the time of the filing of the complaint because FCRA does not require the CRA to
7 notify the consumer when it reports the dispute to the furnisher.” *Keetch* at *3. Accordingly,
8 Plaintiffs adequately pled notice from the CRAs to the creditor, Defendant Chase.
9

10 **D. Washington Consumer Protection Act**

11 Defendant has also moved to dismiss Plaintiffs’ CPA claim on the basis that such claim
12 is preempted by FCRA. Alternatively, Defendant argues that even if the CPA claim is not
13 preempted, Plaintiffs have failed to state a CPA claim.
14

15 *1. Plaintiffs’ CPA Claim is Not Pre-Empted*

16 Defendant first argues that Plaintiffs’ CPA claim is preempted by FCRA. Dkt. #16 at 13.
17 Plaintiffs respond that to the extent their CPA claim is not premised on their FCRA claim, it is
18 not preempted. Dkt. #23 at 14. The Court agrees with Plaintiffs.
19

20 The general rule is that FCRA does not preempt any state law “except to the extent that
21 those laws are inconsistent with any provision of this subchapter, and then only to the extent of
22 the inconsistency.” 15 U.S.C. § 1681t(a). Defendant’s preemption argument arises from an
23 exception to the general rule which provides, in relevant part, that:
24

25 “[n]o requirement or prohibition may be imposed under the laws of any State
26 (1) with respect to any subject matter regulated under-

27 . . .

28 (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish
information to consumer reporting agencies....”

15 U.S.C. § 1681t(b)(1).

1 This Court is not aware of a case in which the Ninth Circuit has directly addressed the
2 interaction between FCRA and Washington’s CPA. In *Gorman*, a case involving a California
3 statute, the Ninth Circuit wrote that the “preemption question posed a difficult issue” and offered
4 some instructive principles. 584 F.3d at 1165. Numerous other courts, including the Ninth
5 Circuit (in dicta), have explained that Congress intended FCRA to preempt state statutes covering
6 conduct regulated by FCRA regarding the duties of furnishers of credit information. *See Gorman*,
7 584 F.3d at 1166 (“§ 1681t(b)(1)(F) appears to preempt all state law claims based on a creditor’s
8 responsibilities under § 1681s–2”); *Dvorak v. AMC Mortg. Services, Inc.*, 2007 WL 4207220, at
9 *5 (E.D. Wash. 2007) (“[Plaintiffs’ CPA] claims are preempted by FCRA because they are based
10 upon the same facts alleged by Plaintiffs in support of their FCRA claims.”).

13 Here, Plaintiffs allege that Defendant has violated FCRA by failing to fulfill its duties
14 under § 1681s–2(b)(1), such as conducting an investigation with respect to the disputed
15 information. Dkt. #1 at ¶ 35. However, Plaintiffs’ CPA claim alleges that Defendant violated the
16 CPA by “making offers to short payoffs to consumers like the Schillings, accepting their
17 payments in connection with the offers, but failing to account for such payments,” and “retaining
18 payments but not acknowledging them and continuing to report the account as ‘charged off,’” and
19 failing “to account for the payment . . . and closing out the Loan as paid in full.” Dkt. #1 at ¶¶ 53
20 and 54. In short, Plaintiffs’ CPA claim is based on Defendant’s written offer to settle the debt for
21 less than what it is owed, inducing a payment, but denying Plaintiffs “the benefit of a satisfaction”
22 – not just conduct related to its re-investigation duties under FCRA. Dkt. #23 at 18. Therefore,
23 Plaintiffs’ CPA claim is not preempted.

26 Likewise, Plaintiffs have not alleged that their injuries were exclusively caused by the
27 erroneous entry on their credit report. This Court held that a plaintiff cannot avoid preemption
28

1 by framing her claim as arising from the repeated harassment attempting to coerce her into signing
2 off on a loan, rather than the erroneous reporting of a loan, when the plaintiff failed to allege
3 separate injuries specifically caused by the threats and harassment. *Ornelas v. Fid. Nat'l Title*
4 *Co. of Wash.*, No. C04-2141RSM, 2005 WL 3359112, at *4 (W.D. Wash. Dec. 9, 2005), *aff'd sub*
5 *nom. Ornelas v. Fid. Nat'l Title Co. of Washington Inc.*, 245 F. App'x 708 (9th Cir. 2007).¹⁰
6

7 Here, Plaintiffs specifically allege Defendant's CPA violations caused injuries to their
8 credit worthiness, diminution in the value of their home, and "[b]ut for Chase's failure to account
9 for the payment made by the Schillings and closing out the Loan as paid in full, they would not
10 have to suffer actual damages, including out-of-pocket expenses and attorney's fees." Dkt. #1 at
11 ¶ 54. Therefore, Plaintiffs alleged injuries are not *exclusively* tied to the allegedly erroneous entry.
12

13 2. *Substantively Fails to State a Claim*

14 Defendant also moves to dismiss Plaintiffs' CPA claim on the ground that Plaintiffs
15 insufficiently pled four of the five elements required for such a claim. The CPA prohibits "[u]nfair
16 methods of competition and unfair or deceptive acts or practices in the conduct of any trade or
17 commerce." RCW 19.86.020. A private cause of action exists under the CPA if (1) the conduct is
18 unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes
19 injury (5) to plaintiff's business or property. *Hangman Ridge Training Stables, Inc. v. Safeco*
20 *Title Ins. Co.*, 105 Wash. 2d 778, 780 (1986). Defendant argues Plaintiffs have not sufficiently
21 alleged the first, third, fourth or fifth elements of the cause of action.
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26 ¹⁰ On appeal in the Ninth Circuit, the Court explicitly pointed out it was not considering to what
27 extent, if any, FCRA pre-empts the CPA because the plaintiff chose not to appeal this Court's
28 ruling that the CPA was partially pre-empted by FCRA. *Ornelas*, 245 F. App'x 708, 709 (9th Cir. 2007).

1 a. Unfair or Deceptive Conduct

2 Defendant argues it did not act deceptively because Plaintiffs’ allegation that Defendant
3 deceived them by not crediting their \$10,000.00 payment is not true,¹¹ and that it was not
4 deceptive for Defendant to cash Plaintiffs’ \$10,000.00 check while failing to release the lien. Dkt.
5 #16 at 14-5. Those arguments misconstrue Plaintiffs’ claim. Plaintiffs allege Defendant’s
6 conduct of “retaining payments but not acknowledging them and continuing to report the account
7 as ‘charged off’ and otherwise collectible is deceptive.” Dkt. #1 at ¶ 53. Essentially, Plaintiffs
8 assert that Defendant induced them to believe it was willing to accept a short pay off to settle the
9 debt, prompting Plaintiffs to set aside a large lump sum to use as a counteroffer – which Defendant
10 accepted – but then applied it to the principal amount instead of settling the debt. Dkt. #23 at 19.
11
12 The Court agrees with Plaintiffs.
13

14 Plaintiffs here do not allege a *per se* violation of the CPA, Dkt. #1 at ¶ 15, therefore
15 Plaintiffs must allege the conduct is “unfair” or “deceptive” under a case-specific analysis of those
16 terms. *Klem v. Wash. Mut. Bank*, 176 Wash. 2d 771, 785-87 (2013). Whether an act is unfair or
17 deceptive is a question of law. *McDonald v. OneWest Bank, FSB*, 929 F. Supp. 2d 1079, 1097
18 (W.D. Wash. 2013) (citing *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wash. 2d 133, 150
19 (1997)). A deceptive act under Washington law must have “the *capacity* to deceive a substantial
20 portion of the public.” *Hangman Ridge*, 105 Wash. 2d at 785 (emphasis added). Even accurate
21 information may be deceptive “if there is a representation, omission or practice that is likely to
22 mislead.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash. 2d 27, 50 (2009) (quoting *Sw. Sunsites,*
23 *Inc. v. Fed. Trade Comm’n*, 785 F.2d 1431, 1435 (9th Cir.1986)). Misrepresentation of the
24
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27 ¹¹ Defendants argue the \$10,000.00 payment was “accounted for.” Dkts. # 16 at 14 and #1-2 at
28 23 and 49.

1 material terms of a transaction or the failure to disclose material terms violates the CPA. *State v.*
2 *Ralph Williams’ N.W. Chrysler Plymouth, Inc.*, 87 Wash. 2d, 298, 305–09 (1976).

3 Plaintiffs have plausibly alleged the existence of a settlement contract that extinguished
4 their debt. Taking Plaintiffs factual allegations as true, and making all reasonable inferences in
5 their favor, Defendant’s alleged practice of inducing payments under the guise of settling a debt
6 but applying it to the principal amount, continuing debt collection efforts, and reporting the debt
7 as “charged off” is deceptive. Where, as here, consumers make a payment in response to an offer
8 to settle the debt, it is reasonable for the consumer to assume the payment will be attributed to
9 satisfy the debt (per the offer). Applying a payment to the balance of the original debt and failing
10 to provide any notification to consumers that such accounting will occur – especially when
11 consumers are responding to a creditor’s offer to settle the debt – could constitute a failure to
12 disclose material terms of the transaction, and may therefore, be a deceptive practice.¹²

15 Alternatively, the Court agrees that Plaintiffs have sufficiently alleged Defendant’s
16 conduct was unfair. Defendant argues Plaintiffs have not alleged a *per se* unfair trade practice,
17 nor shown Defendant’s actions affect anyone other than themselves, and Defendant contends it is
18 “not unfair to take a required payment that is less than the amount due, and less than the amount
19 offered to settle the loan and not release the obligation.” Dkt. #16 at 15. Plaintiffs alleges that
20 Defendant’s conduct of making offers of short payoffs to consumers like Plaintiffs, accepting
21 their payments in conjunction with such offers, but failing to report these payments is unfair. Dkt.
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23

25 ¹² Defendant offers no legal authority in support of its position that “Chase has no obligation to
26 notify [Plaintiffs] of anything when they make any payment on their loan.” *See* Dkt. #24 at 7.
27 Defendant also argues that “[e]very consumer understands that payments on the loan are applied
28 to the loan balance.” Dkt. #24 at 10. Defendants have mischaracterized the instant matter. Here,
the Defendant initiated offers to settle the debt Plaintiffs owed for pennies on the dollar,
prompting the first payment Plaintiffs had made since 2010. Dkt. #1 at ¶¶ 11, 12 and 20.

1 #1 at ¶ 52. Essentially, Plaintiffs argue that Defendant acted unfairly by retaining a significant
2 sum of money Plaintiffs’ believed would settle their debt, Defendants knew Plaintiffs believed it
3 would settle their debt, and it was Defendant’s actions that created Plaintiffs’ good faith reliance
4 that the check would settle their debt. Dkt. #23 at 19.

5 The Washington Supreme Court has suggested a defendant’s act or practice might be
6 “unfair” if it “offends public policy as established ‘by statutes [or] the common law,’ or is
7 ‘unethical, oppressive, or unscrupulous,’ among other things.” *Klem*, 176 Wash. 2d at 786
8 (alteration in original) (quoting *Magney v. Lincoln Mut. Sav. Bank*, 34 Wash. App. 45, 57 (1983)).
9 The “universe of ‘unfair’ business practices is broader than, and encompasses, the universe of
10 ‘deceptive’ business practices.” *Kazman v. Land Title Co.*, No. C11-1210 RSM, 2012 WL
11 4336727, at *4 (W.D. Wash. Sept. 21, 2012) (quoting *Panag*, 166 Wash. 2d at 51). Therefore,
12 while a deceptive practice is necessarily unfair, an unfair act is not necessarily deceptive. *Id.*
13 When an act causes substantial injury that is “not outweighed by countervailing benefits to
14 consumers or competitors, and not reasonably avoidable by the consumer,” it is unfair. *Id.*

15 Accordingly, Plaintiffs have adequately pled that Defendant’s alleged conduct was unfair.
16

17
18 b. Affecting the Public Interest

19 Defendant next argues that Plaintiffs have not alleged facts “showing that the alleged
20 factual situation commonly occurs.” Dkt. #16 at 16. Defendants further argue that “[i]f allowed
21 to state a claim, [Plaintiffs’] actions (not Chase’s) will hurt consumers as lenders will have no
22 incentive to make settlement offers on past-due loans.” Dkt. #24 at 10. Plaintiffs respond by
23 pointing to their Complaint, which alleges that “Chase regularly engages in the practice of making
24 offers to settle second mortgages and inducing payments from consumers but not taking care to
25 report the payments to the CRAs” meaning “[t]here have been other cases or will be other cases
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1 in which the consumer is harmed in the same or similar fashion as the [plaintiffs],” Dkts. #1 at ¶
2 53 and #23 at 20.

3 To establish the public interest element, there must be a real and substantial potential for
4 repetition, “as opposed to a hypothetical possibility of an isolated unfair or deceptive act’s being
5 repeated.” *Michael v. Mosquera-Lacy*, 165 Wash. 2d 595, 604-05 (2009) (quoting *Eastlake*
6 *Constr. Co., Inc. v. Hess*, 102 Wash. 2d 30, 52 (1984)); *see also* RCW 19.86.093. Plaintiffs’
7 factual allegations are accepted as true in the context of a motion to dismiss. Therefore, they have
8 sufficiently pled the public interest element of their CPA claim.
9

10 c. Injury and Causation

11 Defendant – for the first time in their reply brief – argues that Plaintiffs “have lost nothing
12 – they merely made a payment they were already obligated to make.” Dkt. #24 at 11. Since “[i]t
13 is well established that new arguments . . . presented for the first time in Reply are waived,”
14 *Docusign, Inc.*, 468 F. Supp. 2d at 1307, the Court could disregard this argument.
15

16 That said, Defendant misconstrues Plaintiffs’ allegations. Plaintiffs alleged Defendant’s
17 actions caused injuries to their credit worthiness, diminution in the value of their home, *and* “[b]ut
18 for Chase’s failure to account for the payment made by the Schillings and closing out the Loan
19 as paid in full, they would not have to suffer actual damages, including out-of-pocket expenses
20 and attorney’s fees.” Dkt. #1 at ¶ 54.
21

22 Furthermore, Plaintiffs’ allegations give rise to the inference that Defendant’s allegedly
23 deceptive and unfair acts forced them to expend time and money attempting to determine how the
24 payments applied to the loan. Dkt. #1 at ¶ 54. Plaintiffs sent written requests for information four
25 times – Defendant responded to none. It is true the costs of instituting a CPA action to challenge
26 Defendant’s conduct do not, in and of themselves, constitute cognizable injury. *Demopolis v.*
27
28

1 *Galvin*, 57 Wash. App. 47, 54 (1990). But investigation expenses and other costs associated with
2 dispelling the uncertainty created by Defendant’s deceptive conduct sufficiently establishes injury
3 under the CPA. *Panag*, 166 Wash. 2d at 62–63; *McDonald v. OneWest Bank, FSB*, 929 F. Supp.
4 2d 1079, 1098 (W.D. Wash. 2013). *Lucero v. Cenlar, FSB*, No. C13-0602RSL, 2014 WL
5 12026660, at *4 (W.D. Wash. Oct. 3, 2014) (“[I]t is also likely that plaintiff expended time and
6 resources attempting to unwind the misrepresentations and that such costs recoverable.”).

8 As to whether Plaintiffs alleged that their injury was caused by Defendant’s deceptive or
9 unfair conduct, they have adequately pled that Defendant’s conduct caused them harm, as
10 discussed above. *Indoor/Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash. 2d
11 59, 84 (2007). For all of these reasons, the Court declines to dismiss Plaintiffs’ CPA claim.

13 **IV. CONCLUSION**

14 Having reviewed the relevant pleadings and exhibits attached thereto, the Court hereby
15 finds and ORDERS that Defendants’ Motion to Dismiss (Dkt. #16) is DENIED for the reasons
16 discussed herein.

18 DATED this 25th day of April, 2017.

20 

21 **RICARDO S. MARTINEZ**
22 **CHIEF UNITED STATES DISTRICT JUDGE**