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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ANTONIO ESQUIVEL and BEATRIZ  
ESQUIVEL, individually, on  
behalf of all others  
similarly situated, and on  
behalf of the general public,

Plaintiffs,

v.

BANK OF AMERICA, N.A.; BANK  
OF AMERICA CORPORATION; and  
Does 1 through 10, inclusive,

Defendants.

No. 2:12-cv-02502-GEB-KJN

**ORDER ON DEFENDANTS' DISMISSAL  
MOTION**

Defendants Bank of America, N.A., and Bank of America Corporation ("Bank of America and/or Defendants") move for dismissal under Federal Rule of Civil Procedure ("Rule") 12(b)(6) of Plaintiffs' following state claims: breach of contract, promissory estoppel, California Consumer Credit Reporting Agencies Act, Rosenthal Fair Debt Collection Practices Act, and unfair business practices.<sup>1</sup> In essence, this putative class action concerns Defendants' alleged conduct regarding a permanent loan modification under the Home Affordable Modification Program ("HAMP").

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<sup>1</sup> Plaintiffs' Federal Debt Collections Act claim was previously dismissed in an order filed February 21, 2013. (Order, ECF No. 32.)

I. FACTUAL ALLEGATIONS

1  
2 Plaintiffs allege the following in their Class Action  
3 Complaint ("Complaint"). Plaintiffs "Beatriz and Antonio Esquivel  
4 are senior citizens who own and live at their home at 430 La  
5 Esperanza Drive in Dixon, California." (Compl. ¶ 12, ECF No. 1.)  
6 They "bought their home in 2001," and they refinanced their home  
7 in 2009 "with a loan of approximately \$322,975 insured by the  
8 Federal Housing Administration ("FHA")." (Id. at ¶ 13.)  
9 Subsequently, Plaintiffs "fell behind on their mortgage  
10 payments," and "applied to their mortgage servicer, . . . Bank of  
11 America, for a mortgage modification in or about August, 2011."  
12 (Id. at ¶ 15.)

13 Initially, Bank of America offered, and Plaintiffs  
14 accepted, a "trial mortgage modification" that "required monthly  
15 trial period plan payments of \$1,509.52." (Id. at ¶ 16.)  
16 Plaintiffs timely made the monthly payments, and subsequently,  
17 Bank of America offered Plaintiffs a permanent modification under  
18 the FHA's Home Affordable Modification Program ("HAMP") in late  
19 February, 2012. (Id. at ¶¶ 16-17.) Under the FHA-HAMP partial  
20 claim procedure:

21 the lender reduces the loan principal as part  
22 of a modification, requiring the borrower to  
23 execute a promissory note and subordinate  
24 mortgage payable to the Secretary of Housing  
25 and Urban Development. The partial claim  
26 promissory note carries no interest, and is  
27 not due until the borrower pays off the  
28 mortgage or no longer owns the property. The  
lender then files the partial claim against  
the FHA mortgage insurance, and is  
compensated by HUD both for the amount of the  
reduction in principal, and with incentive  
payments for the partial claim and for  
modification under the HAMP program.

1 (Id. at ¶ 14.)

2 Specifically, Bank of America offered Plaintiffs an  
3 FHA-HAMP permanent modification which would reduce the unpaid  
4 balance on the note to \$226,755.02 and the interest rate to  
5 4.625%, and extend the term to thirty years. (Id. at ¶ 17.) The  
6 new principal and interest payments would be \$1,165.84 per month;  
7 and with escrow included, the full monthly payment would start at  
8 \$1,515.96. (Id.) As part of the modification, Plaintiffs would be  
9 required to sign a subordinate mortgage ("Partial Claim  
10 Mortgage") "under which Plaintiffs promise to pay the Secretary  
11 of Housing and Urban Development \$93,591.63 under certain  
12 conditions." (Id. at ¶ 19.)

13 "The Esquivels accepted Bank of America's offer of an  
14 FHA-HAMP permanent loan modification by signing and notarizing  
15 the Modification Agreement, the Subordinate Note, and the Deed of  
16 Trust on February 25, 2012, returning the signed documents to  
17 Bank of America, and making payments under the modified  
18 mortgage." (Id. at ¶ 20.) The permanent HAMP agreement alters the  
19 terms of the mortgage for the remaining life of the loan." (Id.)

20 "The Esquivels made timely payments on their modified  
21 loan of \$1,515.96 in March, April, May, June, and July, 2012. The  
22 Esquivels made their first payment of \$1,515.96 on March 2, 2012  
23 because they had already made a payment in February of \$1,509.52-  
24 approximately six dollars less than the modified amount." (Id. at  
25 ¶ 21.)

26 "Despite the Esquivels' months of timely payments on  
27 their modified loan, and Bank of America's recordation of the  
28 partial claim deed of trust, Bank of America has continued to

1 treat the loan as if it were in default." (Id. at ¶ 23.) "The  
2 Esquivel's June, 2012 mortgage statement states that they were  
3 over \$10,000 in arrears on their loan." (Id. at ¶ 24.) "In July,  
4 2012, Bank of America sent them a letter stating the amount they  
5 had paid was insufficient to cover the full payment due of  
6 \$2,088.43, and returning partial payment to them. Bank of America  
7 has since refused to accept further payments on the loan." (Id.)

8 Bank of America reported to . . . credit  
9 reporting agencies that they were  
10 increasingly late on their mortgage payments.  
11 From February, 2012, when the Esquivels  
12 became current on their mortgage, to the  
present, Bank of America reported them as  
between 120 days and 180 days late on their  
mortgage.

13 (Id. at ¶ 27.) Further, "Bank of America recorded a Notice of  
14 Default against the property on or about August 2, 2012. . . .  
15 The Notice of Default asserted that the Esquivels were over  
16 \$13,000 in arrears on their loan." (Id. at ¶ 28.)

17 "Because of Bank of America's . . . conduct in  
18 treating the loan as in default and attempting to foreclose on  
19 the home while Plaintiffs are current on their mortgage,  
20 Plaintiffs have suffered substantial damages, including but not  
21 limited to monetary damages from damage to their credit,  
22 unwarranted fees, and emotional harm." (Id. at ¶ 30.) Further,  
23 "[u]nless the Notice of Default is rescinded, Bank of America  
24 can, under California's nonjudicial foreclosure statute, proceed  
25 with foreclosure." (Id. at ¶ 29.)

26 Plaintiffs seek "judicial intervention to halt the sale  
27 of their home," damages, specific performance, injunctive relief,  
28 and restitution, together with attorney fees, costs, and

1 expenses. (Id. at ¶ 29, prayer for relief.)

2 **II. LEGAL STANDARD**

3 Decision on a Rule 12(b)(6) dismissal motion requires  
4 determination of "whether the complaint's factual allegations,  
5 together with all reasonable inferences, state a plausible claim  
6 for relief." United States ex rel. Cafasso v. Gen. Dynamics C4  
7 Sys., Inc., 637 F.3d 1047, 1054 (9th Cir. 2011) (citing Ashcroft  
8 v. Iqbal, 556 U.S. 662, 678–79 (2009)). "A claim has facial  
9 plausibility when the plaintiff pleads factual content that  
10 allows the court to draw the reasonable inference that the  
11 defendant is liable for the misconduct alleged." Iqbal, 556 U.S.  
12 at 678 (citing Bell Atl. v. Twombly, 550 U.S. 544, 556 (2007)).

13 When determining the sufficiency of a claim under Rule  
14 12(b)(6), "[w]e accept factual allegations in the complaint as  
15 true and construe the pleadings in the light most favorable to  
16 the non-moving party." Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th  
17 Cir. 2011) (internal quotation marks omitted). However, this  
18 tenet does not apply to "legal conclusions . . . cast in the form  
19 of factual allegations." Id. (internal quotation marks omitted).  
20 "Therefore, conclusory allegations of law and unwarranted  
21 inferences are insufficient to defeat a motion to dismiss." Id.  
22 (internal quotation marks omitted); see also Iqbal, 556 U.S. at  
23 678 (quoting Twombly, 550 U.S. at 555) ("A pleading that offers  
24 'labels and conclusions' or 'a formulaic recitation of the  
25 elements of a cause of action will not do.'").

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1 III. DISCUSSION

2 A. Rosenthal Fair Debt Collections Act

3 Defendants seek dismissal of Plaintiffs' claim alleged  
4 under the Rosenthal Fair Debt Collections Act, California Civil  
5 Code sections 1788, *et seq.*, ("Rosenthal Act"), arguing Bank of  
6 America is not a "debt collector" under the act because loan  
7 servicers who acquire servicing rights before the loan is in  
8 default do not qualify as debt collectors, and Plaintiffs "make[]  
9 no allegation that Plaintiffs defaulted on the loan *before* Bank  
10 of America obtained servicing rights." (Defs.' Mot. to Dismiss  
11 ("Defs.' Mot.") 4:5-7, 4:20-5:1, ECF No. 20.) Defendants further  
12 argue "that a mortgage loan is not a 'debt[,] and collection  
13 efforts related to mortgage loans do not constitute 'debt  
14 collection' under the Act[]." (Id. at 5:7-9.)

15 Plaintiffs counter that "the plain language of the  
16 Rosenthal . . . Act . . . defining debt collectors and consumer  
17 debt . . . allows no other conclusion than that the R[osenthal  
18 Act] applies to mortgage servicers collecting mortgage debt."  
19 (Pls.' Mem. P.&A. Opp'n Mot. Dismiss ("Pls.' Opp'n") 16:20-17:1,  
20 ECF No. 21.) Specifically, Plaintiffs argue "the Rosenthal Act is  
21 . . . more expansive in scope, and excludes no one from its  
22 coverage," unlike the Federal Debt Collection Practice Act  
23 ("FDCPA"), which "excludes creditors collecting on their own  
24 debts" and "loan servicers who acquire servicing rights before a  
25 mortgage loan is in default."<sup>2</sup> (Id. at 17:2-10.) Plaintiffs  
26 further argue that "most published cases clearly recognize that

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27 <sup>2</sup> The February 21, 2013 Order, which dismissed Plaintiffs' FDCPA claim  
28 with prejudice, held that "neither Defendant is a 'debt collector' within the  
meaning of the FDCPA." (Order 5:1-10.)

1 the Rosenthal Act applies to mortgage servicers attempting to  
2 collect on home mortgage loans through non-foreclosure  
3 activities" as opposed to the act of foreclosure. (Id. at 11:18-  
4 28.)

5 California's Rosenthal Act was enacted "to prohibit  
6 debt collectors from engaging in unfair or deceptive acts or  
7 practices in the collection of consumer debts and to require  
8 debtors to act fairly in entering into and honoring such  
9 debts . . . ." Cal. Civ. Code § 1788.1. The Rosenthal Act defines  
10 the term "debt collector" as "any person who, in the ordinary  
11 course of business, regularly, on behalf of himself or herself or  
12 others, engages in debt collection." Cal. Civ. Code § 1788.2(c).  
13 "Debt" is defined as "money, property or their equivalent which  
14 is due or owing or alleged to be due from a natural person to  
15 another person." Cal. Civ. Code § 1788.2(d).

16 "As a number of courts have recognized, the definition  
17 of 'debt collector' is broader under the Rosenthal Act than it is  
18 under the FDCPA . . . ." Reyes v. Wells Fargo Bank, N.A., No. C-  
19 10-01667 JCS, 2011 WL 30759, at \*19 (N.D. Cal. Jan. 3, 2012). For  
20 example, the FDCPA explicitly excludes as "debt collector[s]"  
21 persons collecting or attempting to collect debt "which was not  
22 in default at the time it was obtained by such person[,]"  
23 whereas, the Rosenthal Act does not have such an exclusion.  
24 Compare 15 U.S.C.A. § 1692a(6)(F)(iii), with 1788.2(c); see also  
25 Gaudin v. Saxon Mortg. Sers., Inc., --- F.R.D. ----, 2013 WL  
26 4029043, at \*10 (N.D. Cal. 2013) (recognizing this distinction).  
27 Therefore, Defendants are not excluded as "debt collectors" under  
28 the Rosenthal Act because the Complaint lacks an allegation that

1 they obtained servicing rights after Plaintiffs defaulted on the  
2 loan.

3 Further, although district courts have been divided on  
4 the issue of whether non-foreclosure collection efforts related  
5 to a mortgage are outside the scope of the Rosenthal Act, the  
6 Ninth Circuit has recently applied the Rosenthal Act in the  
7 context of a bank's collection activities concerning a HAMP  
8 mortgage modification. See Corvello v. Wells Fargo Bank,  
9 N.A., --- F.3d ----, 2013 WL 4019279, at \*6 (9th Cir. 2013)  
10 (stating "[t]he district court . . . correctly recognized that  
11 Wells Fargo was engaged in debt collection") (citing with  
12 approval Reyes, 2011 WL 30759, at \*20).

13 For the stated reasons, the portion of Defendants'  
14 motion seeking dismissal of Plaintiffs' Rosenthal Act claim is  
15 DENIED.

16 **B. Unfair Business Practices Claim**

17 Defendants seek dismissal of Plaintiffs' unfair  
18 business practices claim, alleged under California Business &  
19 Professions Code sections 17200, *et seq.*, ("§ 17200"), arguing  
20 Plaintiffs have not "plead sufficient facts to plausibly allege  
21 that they suffered an injury in fact and lost money or property  
22 as a result of [Defendants'] alleged actions." (Defs.' Mot. 6:10-  
23 13.)

24 Plaintiffs counter:

25 The Complaint alleges that the Esquivels  
26 entered into and performed on a contract for  
27 permanent loan modification, but Bank of  
28 America nonetheless demanded payments higher  
than those called for in the contract and  
imposed unwarranted fees, increasing their  
alleged unpaid balance. (Compl. ¶ 4). The



1 Complaint alleges that Bank of America  
2 imposed a \$93,000 lien on the Esquivels'  
3 home, supposedly as a condition of the  
4 permanent loan modification, but then  
5 continued to demand the old unpaid balance -  
6 with a net result that the Esquivels  
7 supposedly owed both their old loan balance  
8 and \$93,000 to HUD. (Id. ¶¶ 19, 22, 24, 28).  
9 The Complaint alleges that Bank of America's  
10 incorrect credit reporting caused them  
11 economic damage. ([Id.] ¶¶ 27, 30). There  
12 is simply no doubt that these allegations are  
13 sufficient to confer standing under the UCL.

14 (Pls.' Opp'n 9:11-20.)

15 Section 17200 "prohibits, and provides civil remedies  
16 for, unfair competition, which it defines as 'any unlawful,  
17 unfair or fraudulent business act or practice.'" Kwikset Corp. v.  
18 Sup. Ct., 51 Cal. 4th 310, 320 (2011) (quoting Cal. Bus. & Prof.  
19 Code § 17200). Although "the substantive reach of [section 17200  
20 is] expansive," 2004 amendments to section 17200's "standing  
21 requirement" limited "private standing . . . to any 'person who  
22 has suffered injury in fact and has lost money or property' as a  
23 result of unfair competition." Id. (quoting Cal. Bus. & Prof.  
24 Code § 17204.) "To satisfy the[se] narrower standing  
25 requirements . . . , a party must now (1) establish a loss or  
26 deprivation of money or property sufficient to qualify as injury  
27 in fact, i.e., economic injury, and (2) show that that economic  
28 injury was the result of, i.e., caused by, the unfair business  
practice . . . that is the gravamen of the claim." Id. at 322.  
"There are innumerable ways in which economic injury from unfair  
competition may be shown[, including] . . . [the diminishment of]  
a present or future property interest . . ." Id. at 323.

Here, Plaintiffs allege that "[a]s a direct and proximate result of [D]efendants' unlawful and unfair business

1 practices, Plaintiffs have been injured in fact and have lost  
2 money or property *due to the imposition of a \$93,591.53 note and*  
3 *subordinate lien in favor of the Secretary of Housing and Urban*  
4 *Development on their residence.*" (Compl. ¶ 81 (emphasis added).)  
5 Plaintiffs also allege that the \$93,591.53 note and lien were  
6 imposed in connection with Defendants' offer of a permanent HAMP  
7 mortgage modification. (*Id.* at ¶ 17-22.) These allegations state  
8 sufficient facts to plausibly allege they suffered an injury in  
9 fact and lost money or property as a result of Defendants'  
10 alleged conduct. Therefore, the portion of Defendants' motion  
11 seeking dismissal of Plaintiffs' § 17200 claim is DENIED.

12 **C. California Credit Reporting Agencies Act Claim**

13 Defendants seek dismissal of Plaintiffs' claim alleged  
14 under the California Consumer Credit Reporting Agencies Act  
15 ("CCRAA") on two grounds. "First, [Defendants argue,] to the  
16 extent Plaintiffs purport to assert a claim against Bank of  
17 America under any section of the CCRAA other than section  
18 1785.25(a), the[] claim is preempted by the Federal Credit  
19 Reporting Act [{"FCRA"}]." (Defs.' Mot. 8:10-12.) Plaintiffs do  
20 not oppose this argument.

21 Section 1681t(b)(1)(F) of the FCRA prescribes:

22 No requirement or prohibition may be imposed  
23 under the laws of any State . . . with  
24 respect to any subject matter regulated under  
25 . . . section 1681s-2 of this title, relating  
26 to the responsibilities of persons who  
27 furnish information to consumer reporting  
28 agencies, except that this paragraph shall  
not apply— . . . (ii) with respect to  
section 1785.25(a) of the California Civil  
Code (as in effect on September 30, 1996).

1 15 U.S.C. § 1681t(b)(1)(F).

2 Since the referenced section of the FCRA expressly  
3 preempts state laws applicable to those who furnish information  
4 to consumer reporting agencies except California Civil Code §  
5 1785.25(a), to the extent Plaintiffs' CCRAA claim is based on any  
6 section of the CCRAA other than § 1785.25(a), the claim is  
7 preempted. Accordingly, this portion of Defendants' motion is  
8 GRANTED with prejudice.

9 Second, Defendants argue Plaintiffs' CCRAA claim  
10 alleged under § 1785.25(a) "also fail[s] because Plaintiffs sue  
11 Bank of America in its capacity as a furnisher of credit  
12 information," which Defendants contend "the CCRAA does not permit  
13 . . . ." (Defs.' Mot. 8:16-19.)

14 Plaintiffs rejoin:

15 Defendant[s'] argument regarding furnishers  
16 is simply wrong. To support its argument that  
17 the CCRAA does not permit claims against  
18 furnishers, Bank of America cites two  
19 district court cases which, in turn, rely on  
20 a California appellate case, Pulver v. Avco  
21 Fin. Serv., 182 Cal. App. 3d 622, 633 (1986).  
22 Bank of America's reliance on Pulver is  
23 misplaced. In Pulver, the court held that the  
24 CCRAA's Section 1785.31 did not apply to  
25 furnishers because the federal Fair Credit  
26 Reporting Act did not apply to furnishers,  
27 and the CCRAA's purpose had been to regulate  
28 consumer credit reporting agencies rather  
than those who furnish information to such  
agencies. Pulver, 182 Cal. App. 3d at 633-35.  
The Pulver court's decision, however, came in  
1986, reviewing a prior version of the CCRAA  
that did not include Section 1785.25(a). The  
California legislature amended the CCRAA  
effective July 1, 1993[, ] to include, *inter*  
*alia*, Section 1785.25 entitled "Obligations  
of Furnishers of Credit Information." See  
Cal. Civ. Code 1785.25. The FCRA, in turn,  
was amended in 1996 to exempt Section  
1785.25(a) from preemption. See Gorman v.  
Wolpoff & Abramson, LLP, 584 F.3d 1147, 1172

1 (9th Cir. Cal. 2009). By the plain language  
2 of the current statute, the CCRAA applies to  
furnishers like Bank of America.

3 (Pls.' Opp'n 5:19-6:4.)

4 Section 1785.31 provides a private right of action for  
5 enforcement of 1785.25(a) against furnishers of credit  
6 information. See Gorman v. Wolpoff & Abramson, LLP, 584 F.3d  
7 1147, 1172-73 (9th Cir. 2009) (recognizing that 1785.25(a) may be  
8 enforced by "private rights of action" against "furnisher[s] of  
9 credit information"). Further, this "private right of action to  
10 enforce California Civil Code section 1785.25(a) is not preempted  
11 by the FCRA." Id. at 1173. Therefore, the portion of Defendants'  
12 motion seeking dismissal of Plaintiffs' CCRAA claim alleged under  
13 section 1785.25(a) is DENIED.

14 **D. Breach of Contract Claim**

15 Defendants seek dismissal of Plaintiffs' breach of  
16 contract claim on two grounds: "First," Defendants argue  
17 "Plaintiffs neglect to allege what provisions of the [HAMP  
18 permanent] modification documents [Defendants] allegedly  
19 breached." (Defs.' Mot. 9:16-17.) "Second," Defendants argue  
20 "Plaintiffs' breach of contract claim fails for the additional  
21 reason that Plaintiffs have not alleged any actual damages  
22 resulting from [Defendants'] alleged breach." (Id. at 10:5-6.)

23 Plaintiffs counter: "[t]he Modification Agreement which  
24 Bank of America breached is attached as [an e]xhibit . . . to the  
25 Complaint . . . ; [i]ts language is explicit, and both the  
26 Complaint and Modification Agreement are specific about what  
27 terms were breached." (Pls.' Opp'n 6:13-15.) "Moreover,  
28 [Plaintiffs argue Defendants] can cite no authority for [their]

1 contention that Plaintiffs must identify specific contractual  
2 language in their Complaint to state a [breach of contract]  
3 claim." (Id. at 6:26-28.) Plaintiffs further rejoin that they  
4 "sufficiently plead contract damages" since "it is not necessary  
5 to point out in detail the nature and extent of general damages.  
6 The question of how they arose . . . is the subject of evidence  
7 rather than pleading." (Id. at 7:14-21.) Plaintiffs also argue:

8           specific allegations [in their Complaint]  
9           that they were damaged by Bank of America's  
10           breach in that Bank of America tried to  
11           collect well over \$10,000 of arrears they did  
12           not owe (Compl. ¶ 28) that it sought to  
13           collect on the amount of their original  
14           unpaid balance even though it had induced  
15           them to enter into a \$93,000 debt to HUD in  
16           exchange for a reduction of that debt (id. ¶  
17           25) that it brought them to the brink of  
18           foreclosure (id. ¶ 28) imposed fees in breach  
19           of the contract, and harmed their credit (id.  
20           30). These allegations more than meet the  
21           Iqbal standard for pleading contract damages.

22           (Id. at 7:23-8:1.)

23           To state a claim "for breach of contract, a plaintiff  
24           must plead . . . (1) a contract, (2) plaintiff's performance or  
25           excuse for nonperformance, (3) defendant's breach, and (4) damage  
26           to plaintiff." Walsh v. W. Valley Mission Cmty. Coll. Dist., 66  
27           Cal. App. 4th 1532, 1545 (1998).

28           Here, "the [permanent loan modification agreement] is  
[attached to the Complaint] and . . . [Plaintiffs'] [C]omplaint  
clearly sets out the facts and legal theory under which [they]  
seek relief." Shroyer v. New Cingular Wireless Servs., Inc., 622  
F.3d 1035, 1042 n.7 (9th Cir. 2010). Under such circumstances,  
Defendants have not shown that the Plaintiffs must allege the  
specific contractual provision breached to state a breach of

1 contract claim. Id. at 1042 (reversing district court's dismissal  
2 of breach of contract claim where the specific portions of the  
3 contract that the plaintiff alleges were violated were not set  
4 forth in the complaint); see also McKell v. Wash. Mut., Inc., 142  
5 Cal. App. 4th 1457, 1490 (2006) (stating that "Plaintiffs have  
6 still failed to identify the . . . contractual provision under  
7 which Washington Mutual required them to pay underwriting and  
8 wire transfer costs," but holding that plaintiffs "stated a cause  
9 of action for breach of contract").

10 Further, Plaintiffs have sufficiently alleged damages  
11 resulting from Defendants' alleged breach of the permanent  
12 mortgage modification agreement. See, e.g., Sutcliffe v. Wells  
13 Fargo Bank, N.A., 283 F.R.D. 533, 553 (N.D. Cal. 2012)  
14 (indicating "adverse credit consequences . . . would sufficiently  
15 allege damages to support [the p]laintiffs' breach of contract  
16 claim"); Newsome v. BAC Home Loans Servicing, LP, Nos. C 11-00423  
17 SBA, C 09-5288 SBA, 2011 WL 2462315, at \*2 (N.D. Cal. June 21,  
18 2011) (denying motion to dismiss breach of contract claim for  
19 inadequate allegations concerning damages where the plaintiffs  
20 alleged they "incurred . . . late fees and other charges as a . .  
21 . result of [the d]efendant's alleged breach of their  
22 agreement").

23 For the stated reasons, Defendants' motion to dismiss  
24 Plaintiffs' breach of contract claim is DENIED.

25 **E. Promissory Estoppel Claim**

26 Defendants seek dismissal of Plaintiffs' promissory  
27 estoppel claim, arguing, *inter alia*:

28 Plaintiffs admit that Bank of America's

1           alleged promise to bring Plaintiffs' loan  
2           current was conditioned upon Plaintiffs  
3           'entering into a new subordinate Note and  
4           Deed of Trust, among other requirements.' See  
5           Complt. [sic] ¶ 47. Where an alleged promise  
6           is . . . subject to further considerations,  
7           the "clear and unambiguous" requirement for  
8           promissory estoppel is not met.

9           (Defs.' Mot. 11:8-26.)

10           Plaintiffs do not address this argument in their  
11           opposition. Instead, Plaintiffs confirm that Defendants' alleged  
12           promise for a "permanent loan modification" was conditioned upon  
13           "agree[ing] to a subordinate loan and lien on their property."  
14           (Pls.' Opp'n 8:12-14 (citing Complt. ¶ 47).)

15           "Promissory estoppel is 'a doctrine which employs  
16           equitable principles to satisfy the requirement that  
17           consideration must be given in exchange for the promise sought to  
18           be enforced.'" Kajima/Ray Wilson v. L.A. Cnty. Metro. Transp.  
19           Auth., 23 Cal. 4th 305, 310 (2000) (quoting Raedeke v. Gibraltar  
20           Sav. & Loan Ass'n, 10 Cal.3d 665, 672 (1974)). "The purpose of  
21           this doctrine is to make a promise binding, under certain  
22           circumstances, without consideration in the usual sense of  
23           something bargained for and given in exchange. If the promisee's  
24           performance was requested at the time the promisor made his  
25           promise and that performance was bargained for, the doctrine is  
26           inapplicable.'" Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App.  
27           4th 256, 275 (2011) (quoting Youngman v. Nev. Irrigation Dist.,  
28           70 Cal. 2d 240, 249 (1969)). "Accordingly, a plaintiff cannot  
state a claim for promissory estoppel when the promise was given  
in return for proper consideration. The claim instead must be  
pleaded as one for breach of the bargained-for contract." Id.

1 Here, Plaintiffs allege Defendants' promise "that they  
2 would be brought current on their mortgage" was made "**in exchange**  
3 **for** entering into a new subordinate Note and Deed of Trust, among  
4 other requirements." (Compl. ¶ 47 (emphasis added).) Accordingly,  
5 the portion of Defendants' motion seeking dismissal of  
6 Plaintiffs' promissory estoppel claim is GRANTED. Further, since  
7 it appears Plaintiffs cannot allege any set of facts to support  
8 their promissory estoppel claim, granting leave to amend would be  
9 futile. Therefore, Plaintiffs' promissory estoppel claim is  
10 dismissed with prejudice.

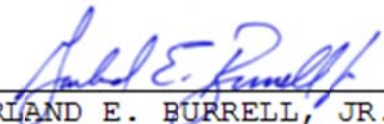
11 **IV. CONCLUSION**

12 For the stated reasons, Defendants' dismissal motion is  
13 denied, except as to the following claims, which are dismissed  
14 with prejudice:

15 1) California Consumer Credit Reporting Agencies Act  
16 claim, to the extent it is based upon violation of any section of  
17 the act, other than California Civil Code section 1785.25(a);

18 2) Promissory Estoppel claim.

19 Dated: October 25, 2013

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23 GARIAND E. BURRELL, JR.  
24 Senior United States District Judge  
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