



1 ("Cenlar") motions to dismiss and strike (Docket Nos. 16, 17,  
2 19). In short, on September 22, 2019 plaintiffs met with a  
3 Citibank representative, Gabriella Peter, at a Sacramento branch  
4 of Citibank to fix their bi-monthly mortgage payment schedule as  
5 Cenlar was rejecting the second payments of each month. (SAC ¶¶  
6 14-17.) During this meeting, Peter assisted with contacting a  
7 Cenlar representative. (Id. ¶ 18.)

8 Plaintiffs allege that during this phone call the  
9 following agreement was made:

10 "A. [Citibank] and [Cenlar] agreed to  
11 recharacterize all past payments incorrectly  
12 applied to principal and apply them to payments  
13 on the loan, to remove all negative credit  
14 reporting and waive late fees.

14 B. Plaintiffs agreed to immediately pay in excess  
15 of \$4,400 for rejected payments along with a  
16 "telephone convenience fee" to bring the account  
17 up to date.

17 C. With the application of payments applied to  
18 principal now reset as payments on the loan,  
19 Plaintiff[s'] account would be paid current  
20 through January 2022"

19 (Id.)

20 Plaintiffs allege that defendants continue to misapply  
21 payments, "report negative credit[,] threaten other legal actions  
22 against [p]laintiffs," and "engage[] in ongoing and constant  
23 harassment of plaintiffs." (Id. ¶¶ 31-32.)

24 II. Discussion

25 The court previously granted Citibank's motion to  
26 dismiss because the First Amended Complaint, (("FAC") (Docket No.  
27 12)), did not plausibly allege that "Citibank was a party to the  
28 alleged September 22, 2019 agreement, was aware of it, or made

1 any representations during the call.” (See April 26, 2022 Order  
2 at 4.) That is no longer true. The SAC plausibly alleges that  
3 Citibank is a party to the contract formed on September 22, 2019  
4 because it states that Peter advised plaintiffs that she was  
5 “authorized to broker an agreement on behalf of Citibank as a  
6 lender.” (SAC ¶ 23.) The SAC also alleges that Citibank  
7 ratified the specifics of how Cenlar was to recharacterize the  
8 payments and Peter stated that Citibank “agreed, as a lender, to  
9 the terms of the” agreement. (Id. ¶¶ 24, 26.)

10 The SAC sufficiently alleges facts supporting each  
11 element of a contract claim under California law against both  
12 defendants. See First Com. Mortg. Co. v. Reece, 89 Cal. App. 4th  
13 731, 745 (2d Dist. 2001) (listing elements for breach of contract  
14 claim: “existence of the contract, performance by the plaintiff  
15 or excuse for nonperformance, breach by the defendant and  
16 damages”).

17 The SAC alleges that the September 22, 2019 agreement  
18 constitutes a contract between Citibank, Cenlar, and plaintiffs  
19 in which plaintiffs would pay \$4,400 and reset their payment  
20 schedule, and in exchange defendants would recharacterize past  
21 payments, waive late fees, and remove negative credit reporting.  
22 (SAC ¶¶ 25-26.) Citibank argues the agreement lacks  
23 consideration. (Citibank’s Mot. at 9.) The court disagrees.  
24 The SAC sufficiently alleges consideration because plaintiffs  
25 agreed to pay \$4,400 on September 22, 2019, which was not a  
26 scheduled payment due on that date pursuant to the original  
27 mortgage agreement, and reset their account to pay \$2,500 each  
28 month, “which was more than the minimum mortgage payment.” (SAC

1 ¶ 20.)

2 The SAC alleges that plaintiffs performed pursuant to  
3 the terms of the agreement by making the necessary payments and  
4 resetting their payment schedule. (Id. ¶ 30.) The SAC also  
5 sufficiently pleads that defendants breached the agreement  
6 because they “continue to misapply payments,” “report negative  
7 credit,” “threaten other legal actions,” and “engage[] in ongoing  
8 and constant harassment of plaintiffs.” (Id. ¶¶ 31-32.) The SAC  
9 also pleads resulting harm by alleging plaintiffs were denied  
10 another loan due to the negative credit reporting. (Id. ¶ 33.)

11 Citibank argues that the oral agreement on September  
12 22, 2019 falls within the statute of frauds, and is therefore  
13 unenforceable. However, as the court determined in its previous  
14 order, the FAC alleged, and the SAC also now alleges, sufficient  
15 facts to support plaintiffs’ claim that Citibank is estopped from  
16 asserting the statute of frauds as a defense if it applies.  
17 “Where assertion of the statute of frauds would cause  
18 unconscionable injury, part performance allows specific  
19 enforcement of a contract that lacks the requisite writing.” In  
20 Re Marriage of Benson, 36 Cal. 4th 1096, 1108 (2005).

21 As discussed in detail in the court’s previous order  
22 (Docket No. 32), plaintiffs sufficiently plead part performance  
23 and unconscionable injury. Plaintiffs paid the agreed upon  
24 \$4,400 and changed their payment schedule, but defendants are  
25 still misapplying payments and making negative credit reports --  
26 leading to denial of another loan plaintiffs applied for. (Id.  
27 ¶¶ 30-33.)

28 Citibank also argues that plaintiffs’ breach of

1 contract claim is preempted by the Fair Credit Reporting Act  
2 ("FCRA"), 15 U.S.C. § 1681, to the extent it is based on the  
3 alleged wrongful furnishing or reporting of credit information.  
4 (Citibank's Mot. at 13.) As the court previously reasoned, the  
5 FCRA does not preempt plaintiffs' breach of contract claim  
6 because Citibank allegedly imposed upon itself the requirement to  
7 stop inaccurately reporting negative credit, and the FCRA  
8 prohibits only legal duties "imposed under the laws of any  
9 state." See 15 U.S.C. § 1681t(b)(1)(F); (April 26, 2022 Order at  
10 9-10).

11 IT IS THEREFORE ORDERED that Citibank's motion to  
12 dismiss (Docket No. 40) be, and the same hereby is, DENIED.

13 Dated: July 26, 2022

14 

15 WILLIAM B. SHUBB  
16 UNITED STATES DISTRICT JUDGE  
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