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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FREDERICK H. ODLE, an)	Case No. CV 15-05019 DDP (JCx)
individual and as Trustees)	
of the Frederick and Cynthia)	
Odle 2013 Trust, Cynthia I.)	
Odle, an individual and)	ORDER GRANTING DEFENDANTS' MOTION
Trustees of the Frederick)	TO DISMISS AND DENYING
and Cynthia Odle 2013 Trust,)	PLAINTIFFS' MOTION TO REMAND
)	
Plaintiff,)	
)	
v.)	
)	Dkt Nos. 8, 10
MGC MORTGAGE INC.,)	
)	
Defendants.)	
)	
)	

Presently before the court is Defendants MGC Mortgage, Inc. ("MGC") and LLP Mortgage, Ltd., Lp ("LLP")'s Motion to Dismiss. Having considered the submissions of the parties, the court grants the motion and adopts the following Order.

I. Background

In 2005, Plaintiffs obtained a \$560,000 refinance mortgage loan, secured by a Deed of Trust. (Complaint ¶ 12.) At some later time, Plaintiffs requested a loan modification from loan servicer

1 MGC. (Id. ¶ 16.) Plaintiffs submitted a complete loan
2 modification application by November 2014. (Id. ¶ 18.) Plaintiffs
3 have since “fallen behind on their monthly mortgage payments.”
4 (Id. 22.)

5 Plaintiffs allege nine causes of action, including violation
6 of California Civil Code §§ 2923.7 and 2924.10, breach of contract
7 and the implied covenant of good faith and fair dealing, negligence
8 and negligent misrepresentation, promissory estoppel, and unfair
9 business practices.¹ Plaintiffs allege that Defendants violated
10 California Civil Code § 2923.7 by failing to update Plaintiffs
11 about the status of their modification application and by providing
12 “multiple and divergent points of contact.” (Compl. ¶ 32.) The
13 Complaint alleges that Defendants violated California Civil Code §
14 2924.10 by failing to provide written acknowledgment of receipt of
15 Plaintiffs’ documents. (Id. ¶ 37.) Plaintiffs further alleges
16 that Defendants breached the terms of the promissory note and deed
17 by failing to “modify the loan if the law interpreted that the
18 interest or other charges exceeds the permitted limits [on variable
19 rate loans].” (Id. ¶¶ 44, 47.) Plaintiffs’ negligence and
20 promissory estoppel claims are premised upon allegations that MGC
21 represented that it would “assist [Plaintiffs] to avoid
22 foreclosure,” and that Defendants then failed to review Plaintiffs’
23 modification application. (Id. ¶ 63-64.) Defendants now move to
24 dismiss the Complaint.

25 **II. Legal Standard**

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28 ¹ Plaintiffs also allege a cause of action for cancellation of
instruments, but do not oppose dismissal of that claim.

1 A complaint will survive a motion to dismiss when it contains
2 "sufficient factual matter, accepted as true, to state a claim to
3 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
4 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
5 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
6 "accept as true all allegations of material fact and must construe
7 those facts in the light most favorable to the plaintiff." Resnick
8 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
9 need not include "detailed factual allegations," it must offer
10 "more than an unadorned, the-defendant-unlawfully-harmed-me
11 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
12 allegations that are no more than a statement of a legal conclusion
13 "are not entitled to the assumption of truth." Id. at 679. In
14 other words, a pleading that merely offers "labels and
15 conclusions," a "formulaic recitation of the elements," or "naked
16 assertions" will not be sufficient to state a claim upon which
17 relief can be granted. Id. at 678 (citations and internal
18 quotation marks omitted).

19 "When there are well-pleaded factual allegations, a court should
20 assume their veracity and then determine whether they plausibly
21 give rise to an entitlement of relief." Id. at 679. Plaintiffs
22 must allege "plausible grounds to infer" that their claims rise
23 "above the speculative level." Twombly, 550 U.S. at 555.

24 "Determining whether a complaint states a plausible claim for
25 relief" is a "context-specific task that requires the reviewing
26 court to draw on its judicial experience and common sense." Iqbal,
27 556 U.S. at 679.

28 **III. Discussion**

1 A. California Civil Code § 2923.7

2 California Civil Code § 2923.7 requires mortgage services to
3 establish a "single point of contact" ("SPOC") for borrowers who
4 request a "foreclosure prevention alternative," such as a loan
5 modification. Cal. Civil Code § 2923.7(a). That point of contact
6 can be a "team of personnel." Cal. Civil Code § 2923.7(e). The
7 SPOC must communicate with the borrower about the application
8 process, deadlines, missing documents, and the current status of
9 the foreclosure alternative. Cal. Civil Code § 2923.7(b).

10 Plaintiffs have adequately alleged that MGC did not update
11 them about the status of their loan modification application, and
12 that no member of the SPOC team could give them a clear answer
13 regarding their inquiries. However, California Civil Code §
14 2924.12(c) provides that a "mortgage servicer . . . shall not be
15 liable for any violation that it has corrected and remedied prior
16 to the recordation of a trustee's deed upon sale" Cal.
17 Civil Code § 2924.12(c). Here, the Complaint does not allege that
18 any foreclosure activity has taken place, let alone the recording
19 of a trustee's deed upon sale. Nor have Plaintiffs disputed
20 Defendants' representation to the court that no foreclosure
21 activity, including the recording of a notice of default, has
22 occurred. Indeed, Plaintiffs do not address Defendants' arguments
23 in this regard. Plaintiff's California Civil Code § 2923.7 claim
24 is therefore dismissed. See Ellis v. Bank of America, N.A., No. CV
25 13-5257 CAS, 2013 WL 5935412 *4 (C.D. Cal. Oct. 28, 2013).

26 B. Cal. Civil Code § 2924.10

27 The same logic applies to Plaintiffs' claim under California
28 Civil Code § 2924.10. That statute requires mortgage servicers to

1 provide written acknowledgment of a borrow's modification
2 application, as well as other information related to the
3 modification application process. Cal. Civil Code § 2924.10(a).
4 Plaintiffs allege that they submitted a complete loan application,
5 and that an MGC representative confirmed on the phone that the
6 application was complete. Once again, however, Plaintiff fails to
7 address California Civil Code § 2924.12(c). Absent any foreclosure
8 activity, Plaintiffs' California Civil Code § 2924.10 claim is
9 dismissed.

10 C. Breach of Contract and Implied Covenant

11 The elements of a breach of contract claim are (1) the
12 existence of a contract, (2) performance or excuse for
13 nonperformance, (3) defendant's breach, and (4) damages. Oasis
14 West Realty, LLC v. Goldman, 51 Cal.4th 811, 821 (2011); See also
15 Rockridge Trust v. Wells Fargo, N.A., 985 F.Supp.2d 1110, 1141
16 (N.D. Cal. 2013). Defendants argue that Plaintiffs have failed to
17 allege all four of the required elements. The court agrees.

18 Although Plaintiffs' references to the "legal effect" of the
19 contract are not clear in this context, it appears Plaintiffs refer
20 to the note and deed as the contract in question. (Opposition at
21 12; Compl. ¶ 43.) MGC, however, as servicer, was not a party to
22 the note or deed. Nor is LLP's alleged breach clear to the court.
23 Plaintiffs refer to "some agreement that Plaintiffs would receive a
24 good faith loan modification review" and assert that Defendants
25 "breached provisions within the note and deed of trust, in
26 following applicable law & statute and simple common courtesy by
27 misleading Plaintiffs into thinking they would be reviewed in good
28 faith." (Opp. at 12.) At the same time, however, Plaintiffs

1 acknowledge that Defendants had no obligation to issue a loan
2 modification. (Opp. at 3.) They do not, however, allege any other
3 breach of a contractual provision.² Nor have Plaintiffs adequately
4
5 identified any excuse for nonperformance, alleging vaguely and
6 conclusorily that "LPP and/or MGC's conduct prevented [Plaintiffs]
7 from performing their obligation to the loan contract, thus they
8 are excused from their own breach." (Compl. ¶ 49.) Lastly, and
9 given the lack of any alleged breach, it is not apparent to the
10 court how Plaintiffs were damaged. For these reasons, Plaintiffs'
11 Fourth and Fifth causes of action are dismissed.

12 D. Negligence and Negligent Misrepresentation

13 The elements of a negligence claim are: (1) the existence of a
14 duty to exercise due care, (2) breach of that duty, (3) causation,
15 and (4) damages. Merrill v. Navegar, Inc., 26 Cal.4th 465, 500
16 (2001). The "existence of a duty of care owed by a defendant to a
17 plaintiff is a prerequisite to establishing a claim for
18 negligence." Nymark v. Heart Fed. Savings & Loan Assn., 231
19 Cal.App.3d 1089, 1095 (1991). "[A]s a general rule, a financial
20 institution owes no duty of care to a borrower when the
21 institution's involvement in the loan transaction does not exceed
22 the scope of its conventional role as a mere lender of money."
23 Nymark, 231 Cal. App. 3d at 1096.

24 Some courts have applied this logic to circumstances where a
25 loan servicer offers to modify a borrowers loan, reasoning that the
26

27 ² Contrary to Plaintiffs' admission here, the Complaint does
28 allege that both MGC and LPP had an obligation to modify the loan.
(Compl. ¶ 47.)

1 servicer's "involvement in the loan transaction does not exceed the
2 scope of its conventional role as a lender of money." Deschaine v.
3 IndyMac Mortg. Servs., 2014 U.S. Dist. LEXIS 8541, at *17 (E.D.
4 Cal. Jan. 22, 2014) (internal quotation marks omitted); see also
5 Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096
6 (1991). The Nymark rule, however, is not absolute, particularly in
7 the loan modification context. California courts employ a six
8 factor test to determine whether a financial institution owes a
9 duty of care to a borrower, and look to "[1] the extent to which
10 the transaction was intended to affect the plaintiff, [2] the
11 foreseeability of harm to him, [3] the degree of certainty that the
12 plaintiff suffered injury, [4] the closeness of the connection
13 between the defendant's conduct and the injury suffered, [5] the
14 moral blame attached to the defendant's conduct, and [6] the policy
15 of preventing future harm." Nymark, 231 Cal. App. 3d at 1098
16 (citing Biakanja v. Irving, 49 Ca.2d 647 (1958)).

17 California courts are currently divided as to the question
18 whether lenders owe borrowers a duty of care in processing a loan
19 modification. One court has held that lenders have a duty of care
20 to reasonably process a loan modification application where it is
21 foreseeable that failure to do so will result in significant harm
22 to the borrower. Alvarez v. BAC Home Loans Servicing, L.P., 228
23 Cal.App.4th 941, 948 (2014) (holding that lenders have a "duty to
24 use reasonable care in the processing of a loan modification.").
25 However, other courts have concluded that lenders do not owe a duty
26 of care when considering a residential loan modification. Lueras
27 v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 68 (2013)
28 (holding that the defendant banks "did not have a common law duty

1 of care to offer, consider, or approve a loan modification, or to
2 offer [the plaintiff] alternatives to foreclosure.”) District
3 courts in California have also reached different conclusions
4 regarding this issue. See, e.g., Griffin v. Green Tree Servicing,
5 LLC, No. CV 14-09408 MMM, 2015 WL 10059081 at *14 (C.D. Cal. Oct.
6 1, 2015) (noting split and concluding no duty exists); see also
7 Robinson v. Bank of Am., No. 12-CV-494-RMW, 2012 WL 1932842, at *7
8 (N.D. Cal. May 29, 2012); Ansanelli v. JP Morgan Chase Bank, N.A.,
9 No C 10-3892 WHA, 2011 WL 1134451, at *7 (N.D. Cal. Mar. 28, 2011);
10 Watkinson v. MortgageIT, Inc., No. 10-CV-327-IEG, 2010 WL 2196083
11 (S.D. Cal. June 1, 2010); Garcia v. Ocwen Loan Servicing, LLC, No.
12 C 10-290 PVT, 2010 WL 1881098, at *1-3. (N.D. Cal. May 10, 2010).

13 Here, Plaintiffs identify the Biankaja factors, but do not
14 specifically discuss how the facts of this case apply. Although
15 the balance of factors is somewhat close, the court concludes that
16 there was no duty of care here. A loan modification may have
17 affected Plaintiffs insofar as it determined whether they would be
18 able to keep their home or what other efforts they undertook to
19 retain possession. The potential harm to Plaintiff, namely default
20 and foreclosure, from the failure to review Plaintiffs’ application
21 was foreseeable. As discussed above, however, it is unclear
22 whether Plaintiffs have been injured, as no foreclosure activity
23 has taken place. Plaintiffs’ allegations are not sufficiently
24 detailed for the court to make a determination as to the fifth,
25 moral blame factor, although the court notes that, in light of the
26 lack of any foreclosure activity, there does not appear to have
27 been any kind of dual tracking here. But see Alvarez, 228 Cal.
28 App. 4th at 949 (“The borrower’s lack of bargaining power coupled

1 with conflicts of interest that exist in the modern loan servicing
2 industry provide a moral imperative that those with the controlling
3 hand be required to exercise reasonable care in their dealings with
4 borrowers seeking a loan modification.") Imposition of a duty under
5 these circumstances would do little to prevent future harm, as no
6 harm appears to have occurred.

7 Under the circumstances here, Defendants did not have a duty
8 to Plaintiffs. The Sixth and Seventh causes of action are
9 dismissed.

10 E. Promissory Estoppel

11 The elements of promissory estoppel claim are: "(1) a promise
12 clear and unambiguous in its terms; (2) reliance by the party to
13 whom the promise is made; (3)[the] reliance must be both reasonable
14 and foreseeable; and (4) the party asserting the estoppel must be
15 injured by his reliance." Advanced Choices, Inc. v. Dep't of
16 Health Servs., 182 Cal. App. 4th 1661, 1672 (2010). Defendants
17 contend that Plaintiffs have not sufficiently identified what the
18 promise at issue was, or who made it. (Motion at 16.) As to the
19 substance of the promise, the court disagrees. The Complaint
20 sufficiently alleges that Defendants promised that the loan
21 modification application was being reviewed on the merits, that
22 Defendants expressly represented that they would engage in
23 negotiations for the purpose of modifying the loan, and that such
24 negotiations would prevent foreclosure. (Compl. ¶¶ 84, 87.) The
25 court agrees, however, that the Complaint is unclear as to who made
26 these promises to Plaintiffs. Although it would appear that
27 Plaintiffs only interacted with MGC representatives, the promissory
28 estoppel cause of action is alleged against both MGC and LLP, and

1 refers to Defendants in the plural. For this reason, the Eighth
2 Cause of Action is dismissed.

3 **IV. Conclusion**

4 For the reasons stated above, Defendants' Motion to Dismiss is
5 GRANTED.³ Plaintiffs' Complaint is DISMISSED, with leave to amend.⁴
6 Any amended complaint shall be filed within fourteen days of the
7 date of this Order. Plaintiffs' Motion to Remand (Dkt.10) is
8 DENIED.⁵

9
10 IT IS SO ORDERED.



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13 Dated: May 16, 2016

14 DEAN D. PREGERSON
15 United States District Judge

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20 _____
21 ³ Having dismissed all other causes of action, the court also
22 dismisses Plaintiffs' derivative unfair business practices claim.

23 ⁴ The court's grant of leave to amend should not be read to
24 suggest that any cause of action will or will not be viable upon
25 amendment. Plaintiffs are advised to take care that any amended
26 cause of action address the deficiencies described in this Order.

27 ⁵ Plaintiffs fail to address the argument that they seek to
28 enjoin any future foreclosure activity. When a plaintiff attempts
to enjoin a defendant from exercising a right to foreclose, which
in effect prevents the defendant from recouping any losses caused
by the plaintiff's failure to make payments, the amount in
controversy may be measured by the value of the property. See,
e.g., Zepeda v. U.S. Bank, N.A., No. SACV 11-0909 DOC, 2011 WL
4351801 *3-4 (C.D. Cal. Sept. 16, 2011).