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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	)	<b>ORDER GRANTING DEFENDANTS' MOTION</b>
Trustees of the Frederick	)	<b>TO DISMISS</b>
and Cynthia Odle 2013 Trust,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
MGC MORTGAGE INC.,	)	[Dkt. 30]
	)	
Defendants.	)	
	)	
	)	
	)	

Presently before the Court is a Motion to Dismiss filed by Defendants MGC Mortgage, Inc. ("MGC") and LLP Mortgage, Ltd. LP ("LLP"). Having considered the submissions of the parties, the court grants the motion and adopts the following Order.

**I. Background**

In 2007, Plaintiffs obtained a \$560,000 refinance mortgage loan, secured by a Deed of Trust, from BrooksAmerica Mortgage Corporation ("Brooks"). (First Amended Complaint ("FAC") ¶ 12.)

1 At some point, Defendant MGC Mortgage, Inc. ("MGC") became the  
2 mortgage loan servicer. (Id. ¶ 14.) On or about May 3, 2016,  
3 submitted a loan modification application to MGC. (Id. ¶ 17.)  
4 Plaintiffs allege that they requested, but were not assigned, a  
5 single point of contact. (Id. ¶ 27.) Plaintiffs also allege that  
6 they did not receive a written acknowledgment of their application  
7 within five business days of submitting it to MGC. (Id. ¶¶ 33-34.)  
8 At some unspecified time, MGC denied Plaintiffs a loan  
9 modification. (Id. ¶ 46.)

10 Plaintiffs' original Complaint was dismissed with leave to  
11 amend. (Dkt. No. 26, Order Granting Defendants' Motion to Dismiss  
12 "Order") at 10.) Plaintiffs then filed their FAC alleging four  
13 causes of action: (1) violation of California Civil Code section  
14 2923.7, (2) violation of California Civil Code section 2924.10, (3)  
15 negligence, and (4) violation of California Business and  
16 Professions Code section 17200. Defendants now move to dismiss the  
17 FAC.

18 **II. Legal Standard**

19 A complaint will survive a motion to dismiss when it contains  
20 "sufficient factual matter, accepted as true, to state a claim to  
21 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.  
22 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
23 570 (2007)). When considering a Rule 12(b)(6) motion, a court must  
24 "accept as true all allegations of material fact and must construe  
25 those facts in the light most favorable to the plaintiff." Resnick  
26 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint  
27 need not include "detailed factual allegations," it must offer  
28 "more than an unadorned, the-defendant-unlawfully-harmed-me

1 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or  
2 allegations that are no more than a statement of a legal conclusion  
3 "are not entitled to the assumption of truth." Id. at 679. In other  
4 words, a pleading that merely offers "labels and conclusions," a  
5 "formulaic recitation of the elements," or "naked assertions" will  
6 not be sufficient to state a claim upon which relief can be  
7 granted. Id. at 678 (citations and internal quotation marks  
8 omitted).

9 "When there are well-pleaded factual allegations, a court should  
10 assume their veracity and then determine whether they plausibly  
11 give rise to an entitlement of relief." Id. at 679. Plaintiffs  
12 must allege "plausible grounds to infer" that their claims rise  
13 "above the speculative level." Twombly, 550 U.S. at 555.  
14 "Determining whether a complaint states a plausible claim for  
15 relief" is a "context-specific task that requires the reviewing  
16 court to draw on its judicial experience and common sense." Iqbal,  
17 556 U.S. at 679.<sup>1</sup>

18 Although Rule 15 requires courts to "freely give leave when  
19 justice so requires," Fed. R. Civ. P. 15, the Supreme Court has  
20 held that "the grant or denial of an opportunity to amend is within  
21 the discretion of the District Court." Foman v. Davis, 371 U.S.  
22 178, 182 (1962). One justified reason for denying leave to amend is  
23 the "repeated failure to cure deficiencies by amendments previously  
24 allowed." Id.

### 25 **III. DISCUSSION**

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27 <sup>1</sup> Plaintiffs' discussion of the relevant standard does not  
28 cite or discuss either Iqbal or Twombly, or any subsequent  
authority.

1           A.     California Civil Code § 2923.7

2           As explained in this Court's prior Order, California Civil  
3 Code section 2923.7 requires mortgage servicers to establish a  
4 "single point of contact" ("SPOC") for borrowers who request a  
5 "foreclosure prevention alternative," such as a loan modification.  
6 Cal. Civil Code § 2923.7(a). The SPOC must communicate with the  
7 borrower about the application process, deadlines, missing  
8 documents, and the current status of the foreclosure alternative.  
9 Cal. Civil Code § 2923.7(b). However, California Civil Code §  
10 2924.12(c) provides that a "mortgage servicer . . . shall not be  
11 liable for any violation that it has corrected and remedied prior  
12 to the recordation of a trustee's deed upon sale . . . ." " Cal.  
13 Civil Code § 2924.12(c).

14           As they did in their original Complaint, Plaintiffs allege  
15 that they requested an SPOC and that Defendants did not provide  
16 one. (FAC ¶ 27.) As in the original Complaint, however, the FAC  
17 does not allege that any foreclosure activity has taken place, let  
18 alone that a trustee's deed upon sale has been recorded. Nor do  
19 Plaintiffs dispute Defendants' representation to the court that no  
20 foreclosure activity, including the recording of a notice of  
21 default, has occurred. Plaintiffs once again ignore Defendants'  
22 arguments and make no mention of the Section 2924.12(c) bar.  
23 Plaintiff's California Civil Code section 2923.7 claim is therefore  
24 dismissed with prejudice.

25           B.     California Civil Code § 2924.10

26           Plaintiffs' claim under California Civil Code section 2924.10  
27 suffers, as it did in Plaintiffs' original Complaint, from the same  
28 deficiency. As they did in their original Complaint, Plaintiffs

1 allege that Defendants did not provide them with a written  
2 acknowledgment of the loan modification application. (FAC ¶ 33.)  
3 California Civil Code section 2924.10 requires mortgage servicers  
4 to provide written acknowledgment of a borrower's modification  
5 application within five business days of receipt. Cal. Civ. Code §  
6 2924.10(a). Once again, however, Plaintiffs continue to ignore  
7 Defendants' arguments and California Civil Code section 2924.12(c).  
8 Absent any allegations of foreclosure activity, Plaintiffs'  
9 California Civil Code section 2924.10 claim is dismissed with  
10 prejudice.

11 C. Negligence

12 As in their original Complaint, Plaintiffs allege a cause of  
13 action for negligence against Defendants. (FAC ¶¶ 36-51.) The  
14 elements of a negligence claim are (1) the existence of a duty to  
15 exercise due care, (2) breach of that duty, (3) causation, and (4)  
16 damages. Merrill v. Navegar, Inc., 26 Cal.4th 465, 500 (2001).  
17 The "existence of a duty of care owed by a defendant to a plaintiff  
18 is a prerequisite to establishing a claim for negligence." Nymark  
19 v. Heart Fed. Savings & Loan Assn., 231 Cal. App. 3d 1089, 1095  
20 (1991).

21 "[A]s a general rule, a financial institution owes no duty of  
22 care to a borrower when the institution's involvement in the loan  
23 transaction does not exceed the scope of its conventional role as a  
24 mere lender of money." Nymark, 231 Cal. App. 3d at 1096. "[A]  
25 loan modification is the renegotiation of loan terms, which falls  
26 squarely within the scope of a lending institution's conventional  
27 role as a lender of money." Lueras v. BAC Home Loans Servicing,  
28 LP, 221 Cal. App. 4th 49, 67 (2013). Thus, a residential lender

1 does not owe "a common law duty of care to offer, consider, or  
2 approve a loan modification, or to explore and offer foreclosure  
3 alternatives." Id.

4 Nevertheless, "Nymark does not support the sweeping conclusion  
5 that a lender never owes a duty of care to a borrower. Rather, the  
6 Nymark court explained that the question of whether a lender owes  
7 such a duty requires the balancing of the 'Biakanja factors.'" "  
8 Alvarez v. BAC Home Loans Servicing, L.P., 228 Cal. App. 4th 941,  
9 945 (2014) (internal alterations, quotations, and citations  
10 omitted).<sup>2</sup> For instance, "a lender does owe a duty to a borrower  
11 to not make material misrepresentations about the status of an  
12 application for a loan modification . . . ." Lueras, 221 Cal. App.  
13 4th at 68. Likewise, "where defendants allegedly agree[] to  
14 consider modification of the plaintiffs' loans, the Biakanja  
15 factors clearly weigh in favor of a duty." Alvarez v. BAC Home  
16 Loans Servicing, L.P., 228 Cal. App. 4th at 948.

17 The Biakanja factors are: "[1] the extent to which the  
18 transaction was intended to affect the plaintiff, [2] the  
19 foreseeability of harm to him, [3] the degree of certainty that the  
20 plaintiff suffered injury, [4] the closeness of the connection  
21 between the defendant's conduct and the injury suffered, [5] the  
22 moral blame attached to the defendant's conduct, and [6] the policy  
23 of preventing future harm." Biakanja v. Irving, 49 Cal. 2d 647, 650  
24 (1958); see also Nymark, 231 Cal. App. 3d at 1098 (applying the  
25 Biakanja factors in determining whether a financial institution  
26 owed a duty to a borrower-client).

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28 <sup>2</sup> Biakanja v. Irving, 49 Cal.2d 647 (1958).

1           In Lueras, the plaintiff alleged that defendants, the lender  
2 and trustee, "had a duty to offer [him] a loan modification and  
3 breached that duty by refusing to do so." Lueras v. BAC Home Loans  
4 Servicing, LP, 221 Cal. App. 4th 49, 63 (2013). The Court of Appeal  
5 disagreed and held that the Biakanja factors did not support  
6 imposing a duty. Id. at 67. It reasoned that "[i]f the  
7 modification was necessary due to the borrower's inability to repay  
8 the loan, the borrower's harm, suffered from denial of a loan  
9 modification, would not be closely connected to the lender's  
10 conduct." Id. Likewise, "[i]f the lender did not place the borrower  
11 in a position creating a need for a loan modification, then no  
12 moral blame would be attached to the lender's conduct." Id.

13           In Alvarez, in contrast, the plaintiffs did not allege "that  
14 defendants owed plaintiffs a duty to offer or approve a loan  
15 modification." Alvarez, 228 Cal. App. 4th at 944. Instead, they  
16 alleged that the defendant undertook to review the plaintiffs'  
17 loans for a modification. Id. at 944. The plaintiffs further  
18 alleged that the defendants breached that duty by, inter alia,  
19 mishandling the application and failing to review it in a timely  
20 manner. Id. at 945. The plaintiffs argued that because the  
21 defendants agreed to consider the loan modification application,  
22 the defendants owed the plaintiffs a duty to "exercise reasonable  
23 care in [their] review." Id. The Court of Appeal agreed. Id. at  
24 948. Applying the Biakanja factors, the court reasoned that (1)  
25 "[t]he transaction was intended to affect the plaintiffs," (2) "it  
26 was entirely foreseeable that failing to timely and carefully  
27 process the loan modification applications could result in  
28 significant harm to the applicants[,]" (3) "the plaintiffs alleged

1 the mishandling of their application caused them loss of title to  
2 their home among [and] deterrence from seeking other remedies . .  
3 .[,]" (4) the mishandling of the documents deprived Plaintiff of  
4 the possibility of obtaining the modification, (5) the plaintiffs  
5 had little ability to protect their interests because "the bank  
6 holds all the cards[,]" (6) the California Homeowner Bill of Rights  
7 "demonstrates a rising trend to require lenders to deal reasonably  
8 with borrowers in default to try to effectuate a workable loan  
9 modification." Id. at 948-50 (internal quotations and citations  
10 omitted).

11 As explained in this Court's prior Order, California district  
12 courts, like California state courts, have reached differing  
13 conclusions regarding whether a duty of care exists in the loan  
14 modification context. See, e.g., Griffin v. Green Tree Servicing,  
15 LLC, No. CV 14-09408 MMM, 2015 WL 10059081 at \*14 (C.D. Cal. Oct.  
16 1, 2015) (noting split and concluding no duty exists); see also  
17 Robinson v. Bank of Am., No. 12-CV-494-RMW, 2012 WL 1932842, at \*7  
18 (N.D. Cal. May 29, 2012); Ansanelli v. JP Morgan Chase Bank, N.A.,  
19 No C 10-3892 WHA, 2011 WL 1134451, at \*7 (N.D. Cal. Mar. 28, 2011);  
20 Watkinson v. MortgageIT, Inc., No. 10-CV-327-IEG, 2010 WL 2196083  
21 (S.D. Cal. June 1, 2010); Garcia v. Ocwen Loan Servicing, LLC , No.  
22 C 10-290 PVT, 2010 WL 1881098, at \*1-3. (N.D. Cal. May 10, 2010).  
23 In dismissing Plaintiff's original Complaint, this court observed  
24 that Plaintiffs failed to discuss how the specific facts of this  
25 case apply to the Biakanja factors, and that the court could  
26 therefore not conclude that MGC owed Plaintiffs a duty of care.  
27 (Order at 8-9.)

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1 MGC argues once more that this court should follow Lueras  
2 rather than Alvarez, and contends that all six Biakanja factors  
3 weigh against the finding of a duty under the circumstances here.  
4 (Mot. at 6-8.) Plaintiffs, represented by counsel, assert the  
5 opposite. (Opposition at 12.) Although Plaintiffs identify the  
6 relevant factors, their opposition only argues that the first and  
7 second factors, namely the extent to which the transaction was  
8 intended to affect the plaintiffs and the foreseeability of harm to  
9 them, weigh in favor of a duty. (Id. at 12:21-25.)

10 With respect to those two factors, Defendants' arguments are  
11 not compelling. Defendants contend that California Civil Code  
12 section 2923.6(a) "encourages loan modifications only if  
13 '[a]nticipated recovery under the loan modifications or work-out  
14 plan exceeds the anticipated recovery through foreclosure on a net  
15 present value basis." (Opp. at 7:1-3.) Defendants argue that,  
16 based on this language, mortgage modifications are not intended to  
17 affect the Plaintiffs because the "end aim" of mortgage  
18 modifications is to maximize returns to the lender. (Mot. at 7:4-  
19 5.) The full statute, however, reads:

20 [a] The Legislature finds and declares that any duty  
21 that mortgage servicers may have to maximize net present  
22 value under their pooling and servicing agreements is  
23 owed to all parties in a loan pool, or to all investors  
24 under a pooling and servicing agreement, not to any  
25 particular party in the loan pool or investor under a  
26 pooling and servicing agreement, and that a mortgage  
servicer acts in the best interests of all parties to the  
loan pool or investors in the pooling and servicing  
agreement if it agrees to or implements a loan  
modification or workout plan for which both of the  
following apply:

27 (1) The loan is in payment default, or payment default is  
reasonably foreseeable.

28 (2) Anticipated recovery under the loan modification or

1 workout plan exceeds the anticipated recovery through  
2 foreclosure on a net present value basis.

3 Cal. Civ. Code § 2923.6. Read in its entirety, the statute does  
4 not establish that the "end aim" of mortgage modification  
5 transactions is to benefit lenders, but rather specifies that  
6 servicers owe an equal duty to all investors in a loan pool and  
7 defines what constitutes "acting in the best interests of the loan  
8 pool parties."

9 As to Defendants' arguments regarding the second factor,  
10 Defendants mischaracterize the FAC. Defendants argue that the FAC  
11 alleges a foreseeable risk of foreclosure. (Opp. at 7:9-10.)  
12 While the FAC does allege that default and "imminent foreclosure"  
13 was one of the potential harms, the FAC also identifies "the  
14 disclosure of sensitive information . . . [and] a forestallment of  
15 Plaintiffs from looking sideways for other assistance with their  
16 loan." (FAC ¶ 44.) Although not a model of clarity, this  
17 paragraph does adequately allege that Defendants' acceptance of  
18 Plaintiffs' loan modification application foreseeably caused  
19 Plaintiffs to forego or abandon other efforts to meet their loan  
20 obligations while their modification application was pending.

21 Plaintiffs do not, however, oppose Defendants' arguments with  
22 respect to a majority of the Biakanja factors. Nor do Plaintiffs  
23 address Defendants' arguments that Alvarez is distinguishable on  
24 its facts. (Motion at 11.) Notably, and as discussed above,  
25 Plaintiffs have not alleged that any foreclosure activity,  
26 including the recording of a notice of default, has taken place  
27 here. This fact, unlike the situation in Alvarez, bears on the  
28 third, fourth, and fifth Biakanja factors and weighs against the

1 imposition of a duty. Furthermore, and unlike the plaintiff in  
2 Alvarez, Plaintiffs here do not allege that Defendants mishandled  
3 their loan application or otherwise erred in the processing of the  
4 application. Indeed, the only wrongful conduct alleged in the  
5 negligence cause of action, apart from the inapplicable section  
6 2923.7 and 2924.10 claims described above, appears to be that  
7 "Defendant forced Plaintiffs into delinquency by denying them a  
8 loan modification wrongly and without explanation." (FAC ¶ 46.)  
9 But, even assuming Defendants owed Plaintiffs a duty of care,  
10 California Civil Code section 2923.4 states that although the  
11 purpose of the California Homeowner Bill of Rights ("HBOR") is to  
12 ensure that borrowers are considered for loss mitigation options  
13 such as loan modifications, "[n]othing in the act . . . shall be  
14 interpreted to require a particular result of that process." Cal.  
15 Civ. Code § 2923.4. Thus, the mere denial of Plaintiffs'  
16 modification application could not have constituted a breach of any  
17 duty MGC might have owed to Plaintiffs.

18       Given the differences between the facts alleged here and those  
19 in cases such as Alvarez, along with Plaintiffs' failure to address  
20 Defendants' arguments regarding the majority of the relevant  
21 factors, the court cannot conclude that Defendants owed Plaintiffs  
22 a duty of care. Plaintiffs' negligence claim is, therefore,  
23 dismissed.

24       D. Unfair Business Practices

25       Plaintiffs concede that their claim for unfair business  
26 practices under California Business and Professions Code Section  
27 7200 is predicated on their claims for negligence and HBOR  
28 violations under sections 2923.7 and 2924.10. (Opp. at 15-21.)

1 Because those claims must be dismissed, as discussed above, so too  
2 must Plaintiff's unfair business practices claim.

3 **III. Conclusion**

4 For the reasons stated above, Defendants' Motion to Dismiss is  
5 GRANTED. Plaintiffs' FAC is DISMISSED, with prejudice.

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IT IS SO ORDERED.

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Dated: September 29, 2016

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DEAN D. PREGERSON

United States District Judge