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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

FRED BREINING and CATHY  
BREINING,  
  
Plaintiffs,  
  
v.  
OCWEN LOAN SERVICING, LLC; and  
DOES 1-20, inclusive,  
  
Defendants.

No. 13-cv-2441-TLN-DAD

**ORDER**

The matter is before the Court on Defendant Ocwen Loan Servicing, LLC’s (“Defendant”) motion to dismiss (ECF No. 17) Plaintiffs Fred Breining and Cathy Breining’s (“Plaintiffs”) first amended complaint (“FAC”) (ECF No. 16). For the reasons discussed below, the motion to dismiss is GRANTED.

**I. Facts**

In or around June 2006, Plaintiffs obtained a mortgage from First Federal Bank of California to purchase a property (the “Property”) located in Galt, California. (Def.’s Req. for Jud. Not., ECF No. 6-1 at 2.)<sup>1</sup> According to the FAC, in July, 2012, Plaintiffs submitted a Home

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<sup>1</sup> The Court previously took judicial notice of the deed of trust for the Property. (ECF No. 16 at 2, fn. 2.)

1 Affordable Modification Program (“HAMP”) application to their loan servicer at the time,  
2 GMAC Mortgage, LLC (“GMAC”). (ECF No. 16 ¶ 8.)

3 Subsequently, through January, 2013, Plaintiffs and GMAC communicated at various  
4 points about one or more pending HAMP applications, with GMAC requesting additional  
5 documents and Plaintiff providing those documents. (ECF No. 16 ¶¶ 9–19.)

6 On February 6, 2013, Plaintiffs received notice from GMAC stating the servicing of their  
7 loan had been transferred to Defendant. On February 8, 2013, a representative from GMAC came  
8 to the Property and alluded that foreclosure proceedings were beginning on Plaintiff’s home. On  
9 February 26, 2013, Plaintiffs requested the contact information for a “single point of contact”  
10 with Defendant, but were instructed to continue directing all questions to counsel for GMAC.  
11 (ECF No. 16 ¶¶ 20–22.)

12 On May 30, 2013, Defendant sent Plaintiffs notice providing they had thirty days to  
13 contact Defendant to resolve their delinquency, otherwise Defendant was “permitted under the  
14 laws of the State of California to foreclose” on the property. Plaintiffs assert that at that time,  
15 Defendant had in its possession their completed loan modification application. On May 31, 2013,  
16 Plaintiffs requested an update on their loan modification but did not receive one. (ECF No. 16 ¶¶  
17 23–24.)

18 On June 4, 2013, Defendant sent Plaintiffs correspondence stating that it was unable to fill  
19 Plaintiffs’ request for a loan modification due to Plaintiffs having failed to provide Defendant  
20 with requested additional information. Plaintiffs assert they never failed to comply with requests  
21 for additional information. Since then, Plaintiffs have continued to request updates from  
22 Defendant, and have received conflicting responses regarding whether they will be approved for a  
23 loan modification. Plaintiffs are unsure whether they will be approved. (ECF No. 16 ¶¶ 25–27.)

## 24 **II. Procedural History**

25 The Court notes the preliminary statement made by Defendant in its motion to dismiss  
26 informs that this is the fourth lawsuit Plaintiffs have brought involving the property, and that  
27 Plaintiffs have consistently made late filings in order to prolong litigation. (ECF No. 17 at 2.)

28 The three prior cases, according to Defendant, are *Breining v. Wells Fargo & GMAC*,

1 Sacramento County Super. Ct. Case No. 34-2010-000768320; *Breining v. GMAC*, Sacramento  
2 County Super. Ct. Case No. 34-2012-00121374; and *Breining v. Ocwen Loan Servicing, LLC*  
3 (E.D. Cal. 2:13-cv-01417-TLN-DAD). (ECF No. 17 at 2; ECF No. 6 at 2.)

4 With respect to *Breining v. GMAC*, Sacramento County Super. Ct. Case No. 34-2012-  
5 00121374, Defendant attaches (in this lawsuit) a series of filings relevant to a motion to strike  
6 Defendant brought in that case. These filings include a written ruling by the state court indicating  
7 that Plaintiffs, at minimum, failed to file a first amended complaint within the time frame allowed  
8 by that court.<sup>2</sup> (ECF No. 18-1 at 26–27.)

9 In the prior case before this Court, *Breining v. Ocwen Loan Servicing, LLC* (E.D. Cal.  
10 2:13-cv-01417-TLN-DAD), Defendant sought removal of a complaint from state court, as it  
11 appeared Plaintiffs had filed there, and subsequently filed a motion to dismiss. Plaintiffs then  
12 responded, explaining that the filing in state court had been rejected because the filing fee had not  
13 been attached. (2:13-cv-01417, ECF No. 9 at 2.) Because there was no filed state court  
14 complaint, rendering removal improper, this Court dismissed the action without prejudice on  
15 August 26, 2013. (2:13-cv-01417, ECF No. 11.)

16 As to the instant lawsuit, Plaintiffs originally filed the complaint in Sacramento County  
17 Superior Court, and the case was removed to this Court on November 22, 2013. (ECF No. 1.)  
18 The Court granted Defendant’s first motion to dismiss on July 9, 2014, giving Plaintiffs fourteen  
19 days to file an amended complaint. (ECF No. 15.) Plaintiffs filed a late FAC on July 28, 2014.  
20 (ECF No. 16.) Defendant filed a motion to dismiss the FAC on August 4, 2014. (ECF No. 17.)  
21 Plaintiffs made no further filings until September 5, 2014, when they requested leave to file a late  
22 opposition. The Court denied that request. (ECF No. 23.)

23 The instant FAC contains four claims. Claims one through three state violations of  
24 California’s Homeowner Bill of Rights (“HBOR”) as follows: section 2923.7 (failure to establish  
25 a single point of contact); section 2924.18 (dual tracking, i.e. moving forward with foreclosure  
26 while a loan application is pending); and section 2924.10 (failure to comply with notice  
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28 <sup>2</sup> Under Fed. R. Evid. 201, the Court takes judicial notice of the state court’s ruling (ECF No. 18-1 at 26–27).  
Plaintiff has not opposed Defendant’s request that the Court take judicial notice.

1 requirements upon Defendant’s receipt of a loan modification application). Claim four alleges  
2 common law negligence.

3 **III. Standard of Review: Fed. R. Civ. Proc. 12(b)(6)**

4 Federal Rule of Civil Procedure 8(a) requires that a pleading contain “a short and plain  
5 statement of the claim showing that the pleader is entitled to relief.” On a motion to dismiss, the  
6 factual allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322  
7 (1972). A court is bound to give plaintiff the benefit of every reasonable inference to be drawn  
8 from the “well-pleaded” allegations of the complaint. *Retail Clerks Int’l Ass’n v. Schermerhorn*,  
9 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege “‘specific facts’ beyond those necessary  
10 to state his claim and the grounds showing entitlement to relief.” *Twombly*, 550 U.S. at 570. “A  
11 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
12 the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S.  
13 at 678 (citing *Twombly*, 550 U.S. at 556).

14 Nevertheless, a court “need not assume the truth of legal conclusions cast in the form of  
15 factual allegations.” *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir.  
16 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more than an  
17 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A  
18 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the  
19 elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678  
20 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
21 statements, do not suffice.”). Moreover, it is inappropriate to assume that the plaintiff “can prove  
22 facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not  
23 been alleged[.]” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*,  
24 459 U.S. 519, 526 (1983).

25 Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged “enough  
26 facts to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting  
27 *Twombly*, 550 U.S. at 570). Only where a plaintiff has failed to “nudge[] [his or her] claims . . .  
28 across the line from conceivable to plausible[.]” is the complaint properly dismissed. *Id.* at 680.

1 While the plausibility requirement is not akin to a probability requirement, it demands more than  
2 “a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678. This plausibility inquiry is  
3 “a context-specific task that requires the reviewing court to draw on its judicial experience and  
4 common sense.” *Id.* at 679.

#### 5 **IV. Analysis**

##### 6 A. Homeowner Bill of Rights

7 The Court incorporates by reference the discussion from its previous order regarding  
8 California’s Homeowner Bill of Rights. (ECF No. 15 at 5–6.) In brief: the HBOR went into  
9 effect on January 1, 2013, and the Court does not find it applies retroactively to Defendant’s  
10 conduct. *See Sepehry-Fard v. Aurora Bank FSB*, 2013 WL 2239820, at \*3 (N.D. Cal. 2013);  
11 *McGough v. Wells Fargo Bank, N.A.*, 2012 WL 5199411, at \*5, n. 4 (N.D. Cal. 2012) (“[The  
12 HBOR] amendments do not go into effect until Jan. 1, 2013 and there is no indication that the law  
13 is intended to be, or will be, applied retroactively”). Therefore, to the extent Plaintiffs’ claims  
14 rest upon Defendant’s actions occurring prior to January 1, 2013, this conduct is not actionable  
15 under the HBOR.

##### 16 B. Claim 1: Cal. Civ. Code § 2923.7

17 Section 2923.7 provides, in relevant part, that upon request from the borrower, Defendant  
18 must “promptly establish a single point of contact” with the borrower, in order to facilitate  
19 communication regarding an “available foreclosure prevention alternative,” such as a loan  
20 application submitted by Plaintiffs.

21 The Court views the relevant factual allegations for this claim, taken from the FAC, to be:

22 “On February 26, 2013 Plaintiffs requested the contact information  
23 for the single point of contact at Ocwen. Plaintiffs were not given a  
24 single point of contact at Ocwen and were told to continue directing  
all questions to GMAC.” (ECF No. 16 ¶ 22.)

25 “Plaintiffs continued to request updates from Defendants since  
26 2013 without one substantive response. In fact, as recently as April  
27 2014, Plaintiff was informed that they did in fact qualify for a loan  
28 modification by Defendants. During a conversation with a different  
representative of Defendants, Plaintiffs learned that they did not  
qualify for a loan modification. With the glaring differences in  
representations, Plaintiffs demanded to know exactly what was  
going on with their loan modification. To date, Plaintiffs’ requests

1 have literally gone unanswered.” (ECF No. 16 ¶ 31.)

2 Under Fed. R. Civ. Proc. 8, the complaint must contain: “a short and plain  
3 statement of the claim showing that the pleader is entitled to relief; and [] a  
4 demand for the relief sought, which may include relief in the alternative or  
5 different types of relief.” Plaintiffs state, with respect to this claim, only that  
6 Defendants’ conduct was “a material breach of [the HBOR] and was intentional  
7 and/or reckless; therefore, Plaintiffs are entitled to the greater of treble actual  
8 damages or statutory damages of \$50,000.”<sup>3</sup> (ECF No. 16 ¶ 32.) It appears  
9 Plaintiffs invoke Cal. Civ. Code § 2924.12, which provides in relevant part:

10 (a)(1) If a trustee's deed upon sale has not been recorded, a  
11 borrower may bring an action for injunctive relief to enjoin a  
12 material violation of Section 2923.55, 2923.6, 2923.7, 2924.9,  
13 2924.10, 2924.11, or 2924.17.

14 [...]

15 (b) After a trustee's deed upon sale has been recorded, a mortgage  
16 servicer, mortgagee, trustee, beneficiary, or authorized agent shall  
17 be liable to a borrower for actual economic damages pursuant to  
18 Section 3281, resulting from a material violation of Section  
19 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17 by  
20 that mortgage servicer, mortgagee, trustee, beneficiary, or  
authorized agent where the violation was not corrected and  
remedied prior to the recordation of the trustee's deed upon sale. If  
the court finds that the material violation was intentional or  
reckless, or resulted from willful misconduct by a mortgage  
servicer, mortgagee, trustee, beneficiary, or authorized agent, the  
court may award the borrower the greater of treble actual damages  
or statutory damages of fifty thousand dollars (\$50,000).

21 As with Plaintiffs’ first complaint, they do not appear to seek injunctive relief and  
22 specifically request economic relief. However, Plaintiffs do not state a trustee’s deed upon sale  
23 has been recorded. So, the relief requested by Plaintiffs, under section 2924.12(b), does not  
24 comport with the conditions necessary for seeking this relief. The Court invited Plaintiffs to  
25 clarify the relief requested in its prior order (ECF No. 15); Plaintiffs did not do so. Therefore, this  
26 claim is dismissed.

27  
28 <sup>3</sup> Otherwise, the FAC as a whole contains a boilerplate request for compensatory, consequential, general, punitive  
and/or treble damages, and any other relief the Court deems proper. (ECF No. 16 at 13.)

1 C. Claim 2: Cal. Civ. Code § 2924.18

2 California Civil Code section 2924.18 states in relevant part:

3 (a)(1) If a borrower submits a complete application for a first lien  
4 loan modification offered by, or through, the borrower's mortgage  
5 servicer, a mortgage servicer, trustee, mortgagee, beneficiary, or  
6 authorized agent shall not record a notice of default, notice of sale,  
7 or conduct a trustee's sale while the complete first lien loan  
8 modification application is pending, and until the borrower has  
9 been provided with a written determination by the mortgage  
10 servicer regarding that borrower's eligibility for the requested loan  
11 modification.

12 (2) If a foreclosure prevention alternative has been approved in  
13 writing prior to the recordation of a notice of default, a mortgage  
14 servicer, mortgagee, trustee, beneficiary, or authorized agent shall  
15 not record a notice of default under either of the following  
16 circumstances:

17 (A) The borrower is in compliance with the terms of a written trial  
18 or permanent loan modification, forbearance, or repayment plan.

19 (B) A foreclosure prevention alternative has been approved in  
20 writing by all parties, including, for example, the first lien investor,  
21 junior lienholder, and mortgage insurer, as applicable, and proof of  
22 funds or financing has been provided to the servicer.

23 ...

24 (e) If a borrower has been approved in writing for a first lien loan  
25 modification or other foreclosure prevention alternative, and the  
26 servicing of the borrower's loan is transferred or sold to another  
27 mortgage servicer, the subsequent mortgage servicer shall continue  
28 to honor any previously approved first lien loan modification or  
other foreclosure prevention alternative, in accordance with the  
provisions of the act that added this section.

29 Plaintiff's original complaint brought a claim under section 2924.18. Plaintiff voluntarily  
30 dismissed that claim. (ECF No. 10 at 8–9.) Now, Plaintiffs bring the claim again, but there is no  
31 material change in the factual allegations. Plaintiffs do not allege as follows: that an agent for  
32 Defendant has recorded a notice of default or notice of sale, or conducted a trustee's sale, §  
33 2924.18(a)(1); that "a foreclosure prevention alternative has been approved in writing prior to the  
34 recordation of a notice of default," § 2924.18(a)(2); or that Plaintiffs were approved in writing,  
35 subsequent to a switch in mortgage servicers, for a "first lien loan modification or other  
36 foreclosure prevention alternative," § 2924.18(e). Therefore, the claim is dismissed.

1 D. Claim 3: Cal. Civ. Code § 2924.10(a)

2 Section 2924.10(a) provides that, upon submission by the borrower of a loan modification  
3 or related document, that the servicer will provide written acknowledgement within five days of  
4 receipt, and the acknowledgment will include a description of the loan modification process,  
5 relevant deadlines, expiration dates for submitted documents, and information on a deficiency in  
6 the application.

7 As with Plaintiff's claim under section 2923.7, Plaintiffs again state Defendant's conduct  
8 was "a material breach of [the HBOR] and was intentional and/or reckless; therefore, Plaintiffs  
9 are entitled to the greater of treble actual damages or statutory damages of \$50,000." Claims for a  
10 material violation of 2924.10 are governed by section 2924.12. Section 2924.12 provides that  
11 Plaintiffs may bring an action for injunctive relief if a trustee's deed upon sale has not been  
12 recorded; also, Plaintiffs may bring an action for actual economic damages if a trustee's deed  
13 upon sale has been recorded. Plaintiffs do not allege a trustee's deed upon sale has been  
14 recorded. Plaintiffs do not state they seek injunctive relief and appear to specifically request  
15 economic relief. In short, as with Plaintiffs' first claim, their claim under section 2924.10 lacks  
16 an explanation for the relief sought. In its prior order (ECF No. 15), the Court invited Plaintiffs to  
17 clarify the relief they seek. Plaintiffs did not. Therefore, this claim is dismissed.

18 E. Claim 4: Negligence

19 "An action in negligence requires a showing that the defendant owed the plaintiff a legal  
20 duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of  
21 injuries suffered by the plaintiff." *Ann M. v. Pac. Plaza Shopping Ctr.*, 6 Cal. 4th 666, 673  
22 (1993).

23 Defendant's primary argument is that engaging in the loan modification process does not  
24 entail that it owed Plaintiffs a legal duty. As authority, Defendant cites *Lueras v. BAC Home*  
25 *Loans Servicing, LP*, 221 Cal. App. 4th 49, 66 (Cal. App. 4th Dist. 2013) ("We conclude a loan  
26 modification is the renegotiation of loan terms, which falls squarely within the scope of a lending  
27 institution's conventional role as a lender of money ... the *Biakanja* factors<sup>4</sup> do not support

28 \_\_\_\_\_  
<sup>4</sup> The *Biakanja* factors "to determine whether to recognize a duty of care" are: "(1) the extent to which the



1 imposition of a common law duty to offer or approve a loan modification.”).

2 The Court notes a distinguishable outcome reached in *Alvarez v. BAC Home Loans*  
3 *Servicing, L.P.* 228 Cal. App. 4th 941, 951 (Cal. App. 1st Dist. 2014) (finding defendants,  
4 including the lender and loan servicer, owed plaintiffs a “duty to use reasonable care in the  
5 processing of a loan modification.”)

6 Regardless, the facts pled by Plaintiffs are inadequate to state a claim for negligence,  
7 under *Lueras* or *Alvarez*. For example, in *Alvarez* (which favors Plaintiffs here), the plaintiffs  
8 alleged that defendants actually foreclosed on their properties while they were under  
9 consideration for a HAMP modification, and that defendants relied on incorrect information in  
10 reviewing the application, including using incorrect figures for Alvarez’s monthly gross income  
11 and for the loan amount owing on one of the properties. *Alvarez*, 228 Cal. App. 4th at 945.  
12 Plaintiffs’ factual allegations, as pled, do not “allow[] the court to draw the reasonable inference  
13 that the defendant is liable for the misconduct alleged.”<sup>5</sup> *Iqbal*, 556 U.S. at 678 (citing *Twombly*,  
14 550 U.S. at 556). Thus, the claim is dismissed.

15 F. Injury

16 Generally, it is unclear what Plaintiffs’ injury is. Plaintiffs assert they “have lost the  
17 opportunity to receive a fair review of their loan modification.” (ECF No. 16 ¶ 56.) But the facts  
18 alleged do not indicate that possibility has been foreclosed, nor have Plaintiffs alleged that they  
19 would qualify for a loan modification. Plaintiffs assert they “have expended numerous hours and  
20 resources toward the goal of modifying their loan.” (ECF No. 16 ¶ 56.) But Plaintiffs do not  
21 explain how that constitutes an actionable injury. A complaint must contain “a short and plain  
22 statement of the claim showing that the pleader is entitled to relief; and [] a demand for the relief  
23 sought, which may include relief in the alternative or different types of relief.” Fed. R. Civ. Proc.

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24  
25 transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of  
26 certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the  
27 injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future  
harm.” *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 63 (citing *Biakanja v. Irving* 49 Cal.2d 647  
(1958).

28 <sup>5</sup> See e.g. FAC ¶ 55.

1 8. As it stands, the FAC does not adequately state an injury for which Plaintiffs are entitled to  
2 relief.

3 **V. Order**

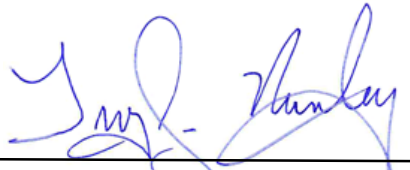
4 For the foregoing reasons, it is hereby ordered:

5 1. Defendant's Motion to Dismiss (ECF No. 17) the First Amended Complaint is  
6 GRANTED.

7 2. Plaintiffs are given leave to amend; failure to cure the deficiencies highlighted in this  
8 Order will result in dismissal with prejudice.<sup>6</sup> Plaintiffs shall file and serve a Second  
9 Amended Complaint within 14 days of entry of this Order.

10 3. Defendants shall file their responsive pleading within 21 days of service of the Second  
11 Amended Complaint.

12  
13 Dated: March 25, 2015

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16 \_\_\_\_\_  
17 Troy L. Nunley  
18 United States District Judge  
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26 <sup>6</sup> Plaintiffs are further advised to address Cal. Civ. Code § 2923.6(g) ("In order to minimize the risk of borrowers  
27 submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall  
28 not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair  
opportunity to be evaluated for a first lien loan modification prior to January 1, 2013, or who have been evaluated or  
afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a  
material change in the borrower's financial circumstances since the date of the borrower's previous application and  
that change is documented by the borrower and submitted to the mortgage servicer.")