United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CESAR GALINDO, ET AL.,

Plaintiffs,

v.

BSI FINANCIAL SERVICES, INC., OCWEN LOAN SERVICING LLC,

Defendant.

Case No. 17-CV-0021-LHK

**ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER**

Re: Dkt. No. 46

Plaintiffs Cesar Galindo ("Galindo") and Maria Rivera ("Rivera") (collectively, "Plaintiffs"), bring suit against Defendant BSI Financial Services, Inc. ("BSI") and Ocwen Loan Servicing LLC ("Ocwen") (collectively, "Defendants") for negligence, violation of California Civil Code § 29236(c), and violation of California's Unfair Competition Law ("UCL"). Before the Court is Plaintiffs' motion for a temporary restraining order ("TRO"), which seeks to enjoin Defendants from foreclosing on Plaintiffs' home on July 19, 2017. *See* ECF No. 46 ("TRO Mot."). Defendants have opposed Plaintiffs' motion. ECF Nos. 52 & 53. For the following reasons, Plaintiffs' TRO motion is DENIED.

## I. BACKGROUND

### A. Factual Background

On September 26, 2006, Galindo borrowed $436,000 from Bank of America, N.A. ("BOA"), secured by a deed of trust encumbering property located at 3146 Barletta Lane in San Jose, CA (hereinafter, "the Property"). ECF No. 31 (First Amended Complaint, or "FAC"), ¶ 14. Plaintiffs defaulted on the loan on March 1, 2009. *See* ECF No. 53-2 (Notice of Default). A Notice of Default and Election to Sell Under Deed of Trust was recorded on March 2, 2011. *Id.*

On September 11, 2012, Ocwen acquired from BOA the servicing rights for Plaintiffs' loan. *See* ECF No. 53-3, at ¶ 5. Plaintiffs "began applying for a [Home Affordable Modification Program ("HAMP")] loan modification." FAC ¶ 18. In 2015, "after years of applications [for home loan modifications] that resulted in bad faith denials, Plaintiffs' filed an administrative complaint with Ocwen. *Id.* ¶ 15. Ocwen informed Plaintiffs that Plaintiffs had been approved for a Trial Period Plan ("TPP") offer on September 14, 2012, but Ocwen ultimately denied Plaintiffs a loan modification on December 13, 2012 because Plaintiffs failed to make the TPP payments. *Id.*, Ex. 2. Further, Ocwen had approved Plaintiffs "for a Proprietary Modification" on December 14, 2014, but Plaintiff failed to make the initial payments by the due date, and accordingly, Ocwen denied Plaintiff a Proprietary Modification on February 11, 2015. *Id.* Ocwen's May 29, 2015 letter to Plaintiffs also informed Plaintiffs that Ocwen received "[a] second HAMP request" from Plaintiffs on April 8, 2015." *Id.* However, Ocwen again denied Plaintiffs a HAMP modification "because the owner of the account either does not allow principal reduction or does not participate in the HAMP" program. *Id.*

In July 2015, BSI acquired from Ocwen the servicing rights to Plaintiffs' loan. *See* ECF No. 52-4 ("BSI Decl."), at ¶ 5; ECF No. 53-3 ("Ocwen Decl."), at ¶ 4. Thereafter, Plaintiffs sent a loan modification request to BSI. *See* BSI Decl., at ¶ 5. On September 22, 2015, Galindo emailed documents to Daniel McAteer ("McAteer"), senior loss mitigation specialist for BSI. FAC ¶ 28. On September 23, 2015, McAteer replied to Galindo and told Galindo that McAteer would forward the documents for review. *Id.* ¶ 29.

On September 28, 2015, BSI filed a Notice of Trustee's Sale (hereinafter, "Notice of Sale") with the Santa Clara County Recorder's Office. *Id.* ¶ 32. The Notice of Sale scheduled

sale for October 30, 2015. Plaintiff alleges that at the time that BSI recorded the Notice of Sale on September 28, 2015, "[n]o decision had been made on Plaintiffs' loan modification application." *Id.* ¶ 33.

**B. Procedural History**

On January 4, 2017, Plaintiffs filed suit against BSI in this Court. ECF No. 1. Plaintiffs alleged four causes of action against BSI: (1) negligence; (2) breach of the implied covenant of good faith and fair dealing; (3) violation of California Civil Code Section 2923.6(c); and (4) violation of the UCL.

On January 26, 2017, BSI moved to dismiss all four causes of action. *See* ECF No. 11. On February 2, 2017, Plaintiffs opposed BSI's motion. ECF No. 14. On February 9, 2017, BSI filed a reply. ECF No. 15.

On March 17, 2017, the Court granted BSI's motion to dismiss. ECF No. 23. As relevant here, the Court held that Plaintiffs failed to state a claim for negligence against BSI because Plaintiffs based their negligence claim, in part, on conduct that was committed by *Ocwen*, not BSI. *Id.* at 10–11. For similar reasons, the Court held that Plaintiffs could not state a claim for violation of the implied covenant of good faith and fair dealing or the UCL against BSI for Ocwen's conduct. The Court held that Plaintiffs also failed to allege that BSI violated California Civil Code § 2923.6(c) because Plaintiffs failed to allege that their application was "complete" within the meaning of the statute, and Plaintiffs had attached an email to the Complaint from McAteer that showed that McAteer considered Plaintiffs' application to be incomplete. The Court granted Plaintiffs leave to amend the complaint within thirty days, but stated that Plaintiffs "may not add new causes of action or parties without leave of the Court or stipulation of the parties pursuant to Federal Rule of Civil Procedure 15." *Id.* at 17.

On April 13, 2017, Plaintiffs filed a motion for leave to file a FAC and requested leave of Court to add Ocwen as a defendant. ECF No. 26. BSI did not oppose Plaintiffs' motion. ECF No. 28. On May 26, 2017, the Court granted Plaintiffs' motion for leave to file a FAC. ECF No. 30.

On May 29, 2017, Plaintiffs filed a FAC, which added Ocwen as a defendant and alleged that BSI violated California Civil Code § 2923.6(c) and that both Ocwen and BSI were negligent and violated the UCL. ECF No. 31.

The Court held a case management conference on June 14, 2017. ECF No. 42. Because Plaintiffs indicated at the case management conference that Plaintiffs may dismiss BSI, the Court ordered Plaintiffs to file by July 5, 2017 either a stipulation of dismissal as to BSI or a statement as to why Plaintiffs are proceeding against BSI. *Id.*

On July 5, 2017, Plaintiffs' counsel filed a declaration stating that Plaintiffs intended to keep BSI as a defendant until Plaintiffs could "add[] in the owner(s) of the loan" to the lawsuit. ECF No. 45.

Also on July 5, 2017, Plaintiffs filed a motion for TRO, which asked the Court to enjoin Defendants from selling Plaintiffs home at a trustee's sale that was scheduled to occur on July 19, 2017. ECF No. 46. Plaintiffs stated in their motion that they had demonstrated a likelihood of success on the merits as to their negligence and UCL claims against Ocwen. *Id.* Plaintiffs' motion for TRO did not address any of Plaintiffs' claims against BSI. In support of their negligence and UCL claims against Ocwen, Plaintiffs submitted a declaration that they learned on May 29, 2015 that Ocwen had offered Plaintiffs a HAMP loan modification on September 14, 2012. *See* ECF No. 46-2, at ¶ 6. However, Plaintiffs "never received notice—either verbally or in writing—of Ocwen's offer." *Id.* ¶ 8. Plaintiffs state that they did not learn of the misconduct until "May 29, 2015" and Plaintiffs "then filed a complaint against various defendants." *Id.*¶ 10.

Plaintiffs' counsel also filed a declaration in support of Plaintiffs' motion for TRO. Plaintiffs' counsel stated that he had provided notice of Plaintiffs' TRO motion to Defendants BSI and Ocwen by mail, email, and phone. ECF No. 46-4, at ¶ 2.

On July 5, 2017, the Court ordered Defendants Ocwen and BSI to file a response to Plaintiffs' application for TRO on or before July 11, 2017.

On July 10, 2017, Defendants Ocwen and BSI filed oppositions to Plaintiffs' motion for TRO. ECF Nos. 52 ("BSI Opp.") & 53 ("Ocwen Opp."). As an initial matter, BSI noted in its

opposition that, effective July 5, 2017, BSI was no longer the servicer of Plaintiffs' home loan. *See* BSI Opp. at 9; BSI Decl., ¶ 5. Rather, "[a]s of July 5, 2017, the servicer of the Loan is Fay Servicing, LLC" ("Fay Servicing"). BSI Opp. at 9; BSI Decl., ¶ 5. BSI states that it has no further involvement with the loan or foreclosure sale. *See* BSI Decl., ¶¶ 5, 11.

Further, BSI stated in its opposition that, although Plaintiffs moved for a TRO on the same day the loan servicing transfer took effect—July 5, 2017—Plaintiffs had been aware since at least May 31, 2017 that the loan servicing transfer was going to take effect on July 5, 2017. Specifically, BSI told Plaintiffs and Plaintiffs' counsel on May 31, 2017 that the service transfer was occurring. *See* BSI Decl., ¶ 5; ECF No. 52-4 ("Ladi Decl."), Ex. B. BSI attached to its opposition a copy of the notice of service transfer, dated May 31, 2017, that was sent to Plaintiffs. *See* Ladi Decl., Ex. B. Moreover, BSI's counsel issued a declaration stating that Plaintiffs' counsel "confirmed receipt of this service transfer notice when [Plaintiffs' counsel] sent [BSI's counsel] an email dated June 7, 2017 in which [Plaintiffs' counsel] advised [BSI's counsel]" that he had received the notice. Ladi Decl., at ¶ 3. BSI's counsel attached the email to his declaration. The attached email shows that Plaintiffs' counsel emailed BSI's counsel on June 7, 2017, and stated "I just received the attached notice of service transfer from your client (BSI) to Fay Loan Servicing." *Id.*, Ex. A. Plaintiffs' counsel attached the service transfer notice to his June 7, 2017 email to BSI. *Id.*

Similarly, Ocwen's opposition to Plaintiffs' TRO motion explained that Ocwen transferred servicing rights to BSI in July 2015, and thus Ocwen has no authority to stop the impending foreclosure sale on Plaintiffs' home. *See* Ocwen Decl. ¶¶ 5, 9. In addition, BSI and Ocwen further argued in their oppositions that Plaintiffs failed to show a likelihood of success on the merits of their claims.

On July 10, 2017, the Court issued an order for Plaintiffs to reply to Defendants' oppositions to Plaintiffs' motion for TRO. ECF No. 54. The Court ordered Plaintiffs to specifically respond to whether (1) they dispute that Defendants are no longer servicing Plaintiffs' loan; and (2) whether Plaintiffs believe the Court can issue Plaintiffs' requested injunction if

Defendants are no longer servicing Plaintiffs' loan. *Id.* The Court further ordered Plaintiffs to explain why Plaintiffs waited until January 2017 to file the instant law suit if Plaintiffs were first aware of Ocwen's misconduct on May 29, 2015, as Plaintiffs alleged in their declaration in support of their TRO. *Id.*

On July 11, 2017, Plaintiffs filed a reply. ECF No. 55 ("Reply"). Plaintiffs did not contest that BSI and Ocwen were no longer the servicers of Plaintiffs' loan. *Id.* at 2. Plaintiffs acknowledged that they knew Fay Servicing would be taking over their home loan, however Plaintiffs stated that they "did not receive notice of new ownership of their mortgage loan" from Fay. *Id.* Plaintiffs argued that this Court still had the authority to enjoin the foreclosure sale because "[w]hile the entity with the authority to stop the foreclosure sale is currently unknown and not named, its close association with BSI or Ocwen permits this Court to issue a TRO against such unnamed entity." *Id.* at 5. Accordingly, Plaintiffs requested that the Court "enjoin BSI, Ocwen, and their associates, aiders, abettors, and successors from conducting the trustee's sale on July 19, 2017." *Id.* Plaintiffs also asserted that they had waited until 2017 to file the Complaint and the instant motion for TRO because, until now, Plaintiffs had received postponements on the foreclosure sales. *See id.* at 5–6.

## II. LEGAL STANDARD

The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). "A plaintiff seeking a preliminary injunction must establish that he [or she] is likely to succeed on the merits, that he [or she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his [or her] favor, and that an injunction is in the public interest." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added).

Moreover, the party seeking the injunction bears the burden of proving these elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). "A preliminary injunction is

'an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (citation omitted) (emphasis in original).

Federal Rule of Civil Procedure 65(b)(1) states that the court may issue a temporary restraining order without notice only if: "(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Also related to notice, the Court's Local Rule 65-1(b) states that, unless relieved by the Court for good cause shown, "on or before the day of an ex parte motion for a temporary restraining order, counsel applying for the temporary restraining order must deliver notice of such motion to opposing counsel or party."

## III. DISCUSSION

For the reasons discussed below, the Court finds that Plaintiffs' TRO motion must be denied because Defendants are not the current servicers of Plaintiffs' loan, and thus Plaintiffs have failed to establish that granting Plaintiffs' requested TRO would remedy Plaintiffs' alleged irreparable harm in this case. In addition, the Court finds that Plaintiffs have failed to demonstrate a likelihood of success on the merits of their claims.

### A. Defendants are not the Current Servicers of Plaintiffs' Loan

First, evidence in the record shows that the only Defendants in this case, BSI and Ocwen, are not the current servicers of Plaintiffs' home loan, and thus Defendants do not have the authority to stop the foreclosure sale scheduled for July 19, 2017.

As set forth above, Ocwen transferred servicing of Plaintiffs' home loan to BSI in July 2015. *See* Ocwen Decl. ¶ 5. Subsequently, effective July 5, 2017, BSI transferred servicing of Plaintiffs' home loan to Fay Servicing. *See* BSI Decl. ¶ 5. Although this most recent change in service took effect on the same date that Plaintiffs filed their TRO motion, BSI has produced unrebutted evidence that on May 31, 2017, BSI sent notice to Plaintiffs' counsel that BSI would

no longer service Plaintiffs' home loan effective July 5, 2017, and that Plaintiffs' counsel acknowledged receipt of this notice to BSI's counsel on June 7, 2017. *See* Ladi Decl., Ex. A. Thus, Plaintiffs have been aware as early as May 31, 2017, and as late as June 7, 2017, that BSI would no longer service Plaintiffs' home loan effective July 5, 2017. *See* Ladi Decl., Ex. A.

Plaintiffs' FAC, filed on May 29, 2017, acknowledged that Ocwen transferred servicing to BSI in mid-2015. FAC ¶19. In Plaintiffs' reply in support of a TRO, Plaintiffs do not contest "that Ocwen and BSI are not the current servicers of Plaintiffs mortgage loan." Reply at 3. Nonetheless, Plaintiffs speculate that BSI is "acting in concert or participating with the" owner of Plaintiffs' loan, and thus Plaintiffs speculate that BSI can in fact stop the foreclosure sale. *See* Reply at 4–5. However, Plaintiffs provide no declarations or evidence in support of this speculation. *See id.* By contrast, both BSI and Ocwen have issued a declaration stating that they do not have any authority to stop or postpone the foreclosure sale on Plaintiffs' home. *See* BSI Decl., at ¶ 11 ("Because BSI is no longer servicer of the Loan, it has no control over the foreclosure date currently pending"); Ocwen Decl., at ¶ 9 ("Because Ocwen is no longer servicer of the Loan, it has no control over the foreclosure date currently pending").

"Under Federal Rule of Civil Procedure 65(d), an injunction binds only 'the parties to the action, their officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice of the order.'" *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) (quoting Fed. R. Civ. P. 65(d)). As set forth above, the Defendants to this action that Plaintiffs seek to enjoin have declared that they do not have the authority to stop the foreclosure sale on Plaintiffs' home. Moreover, Plaintiffs have provided the Court with no evidence to believe that the individuals who *do* have the authority to stop the foreclosure sale are Defendants' "officers" or "agents," or that they are "in active concert or participation" with Defendants. *See* Fed. R. Civ. P. 65(d).

In Plaintiffs' reply brief in support of a TRO, Plaintiffs acknowledge that BSI and Ocwen do not own the loan. Reply at 3. Moreover, on July 5, 2017, Plaintiffs' counsel filed a declaration that Plaintiffs would not dismiss BSI until Plaintiffs could add the owners of the loan to this

lawsuit. *See* ECF No. 45. Accordingly, based on the record currently before the Court, the Court has no reason to believe that Plaintiffs' "requested injunction would forestall" the impending foreclosure sale on Plaintiffs' home. *Perfect10, Inc. v. Google, Inc.*, 653 F.3d 976, 981 (9th Cir. 2011).

Indeed, the Court is disturbed that, although Plaintiffs knew of this issue, Plaintiffs did not raise this issue in Plaintiffs' TRO motion. Plaintiffs' TRO motion did not mention *at all* the change in Plaintiffs' loan servicing, even though Plaintiffs' counsel sent BSI's counsel an email on June 7, 2017—a month before Plaintiffs filed their motion for a TRO— in which Plaintiffs' counsel told BSI's counsel: "I just received the attached notice of service transfer from your client (BSI) to Fay Loan Servicing." *See* Ladi Decl., Ex. A. Accordingly, Plaintiffs were aware for at least a month that BSI would no longer be the servicer of Plaintiffs' home loan effective July 5, 2017. Yet Plaintiffs filed the instant TRO motion on July 5, 2017 to enjoin Ocwen and BSI without mentioning to the Court that BSI was no longer the servicer for Plaintiffs' loan. Moreover, Plaintiffs filed the instant TRO motion ex parte and did not want BSI or Ocwen to provide this information to the Court. The Court was only made aware of the change in Plaintiffs' loan servicer because the Court ordered Defendants to file oppositions to Plaintiffs' TRO motion, and Defendants raised the issue in their oppositions to Plaintiffs' TRO motion.

In sum, because Defendants have submitted evidence that they no longer have authority regarding Plaintiffs' foreclosure sale—and because Plaintiffs have put forth only speculation in return that Defendants do have such authority—the Court concludes that the injunctive remedy that Plaintiffs seek is not likely to remedy Plaintiffs' alleged irreparable harm. For this independent reason, Plaintiffs have not shown entitlement to injunctive relief. *See, Perfect10, Inc.*, 653 F.3d at 981 (denying preliminary injunction because plaintiff failed to show "a sufficient causal connection between" the irreparable harm that it alleged, defendant's conduct, and the injunction that it sought).

**B. Plaintiffs Have Failed to Show Likelihood of Success on the Merits**

In addition, the Court also finds that the *Winter* factors do not support granting a TRO in

this case. As set forth above, in order to establish that a TRO is warranted, Plaintiffs must establish (1) likelihood of success on the merits; (2) irreparable harm; (3) that the balance of the equities tips in Plaintiffs' favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. For the reasons discussed below, the Court determines that Plaintiffs have failed to establish a likelihood of success on the merits of their claims against Ocwen for negligence and violation of the UCL, which are the only claims that Plaintiffs brief in their TRO motion and discuss in their declaration in support of their TRO motion. *See* TRO Mot. Accordingly, the Court addresses only those claims. The Court first discusses Plaintiffs' negligence claim, and then discusses Plaintiffs' UCL claim.

**1. Negligence**

The elements of negligence in California are: (1) defendant had a legal duty to use due care towards the plaintiff; (2) the defendant breached that duty; and (3) the breach was the proximate or legal cause of (4) the resulting injury. *Ladd v. Cty. of San Mateo*, 911 P.2d 496, 498 (Cal. 1996). The California Supreme Court has identified six factors, known as the *Biakanja* factors, to determine whether there is a duty of care. The *Biakanja* factors are: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm. *See Biakanja v. Irving*, 49 Cal. 2d 657, 650 (1958).

Plaintiffs contend that the *Biakanja* factors support finding that Ocwen owed a duty of care to Plaintiffs, and that Ocwen breached this duty of care because Ocwen failed to provide Plaintiffs with notice of a HAMP loan modification offer in September 2012. By contrast, Ocwen contends that the *Biakanja* factors do not support finding that Ocwen owed any duty of care to Plaintiffs.

"As a general rule in California, a 'financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Alvarez v. BAC Home Loans Serv., L.P.*, 228 Cal.

App. 4th 941, 944 (Cal. Ct. App. 2014) (citing *Lueras v. BAC Home Loans Serv., L.P.*, 221 Cal. App. 4th 49, 62 (Cal. Ct. App. 2013)). However, in applying this general rule, California courts have differed in their application of the *Biakanja* factors in the home loan modification context.

In *Lueras*, 221 Cal. App. 4th at 67, the California Court of Appeals concluded that "a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money." The *Lueras* court reasoned that the *Biankanja* factors did not support finding a duty of care because the borrower's harm—being unable to make payments on their loan—was a result of the borrower's default on their home loan, and was not "closely connected to the lender's conduct" as long as the lender did not place the borrower in a position that created the need for the loan modification in the first place. *Id.* Thus, the *Lueras* court concluded that the lender had no common law duty under California law "to offer or approve a loan modification." *Id.*

However, in *Alvarez*, the California Court of Appeals concluded that a lender did have a common law duty "to exercise reasonable care in the review of [plaintiffs'] loan modification applications once [the lender] had agreed to consider" the plaintiffs' loan modification applications. *Alvarez*, 228 Cal. App. 4th at 944. The plaintiffs in *Alvarez* alleged that the lender improperly handled their home loan modifications and that the lender's delay in processing the plaintiffs' loan modification "deprived [Plaintiffs] of the opportunity to seek relief elsewhere." *Id.* The *Alvarez* court reasoned that "[t]he transaction was intended to affect the plaintiffs and it was entirely foreseeable that failing to timely and carefully process the loan modification applications could result in significant harm to" plaintiffs. *Id.* at 951. The court in *Alvarez* thus held that the *Biankanja* factors supported finding a duty of care. *Id.* at 952.

There has been disagreement amongst federal courts as to whether *Lueras* or *Alvarez* is more persuasive. *Compare Romo v. Wells Fargo Bank, N.A.*, 2016 WL 324286, at *9 (N.D. Cal. Jan. 27, 2016) (stating that "most federal district courts have followed *Alvarez*"), *with Marques v. Wells Fargo Bank, N.A.*, 2016 WL 5942329, at *7 (N.D. Cal. Oct. 13, 2016) ("A growing number of courts that have addressed this issue since *Lueras* and *Alvarez* have adopted the holding in

*Lueras* in finding that a mortgage servicer does not owe borrowers a duty of care in processing a residential loan modification"). Notably, the Ninth Circuit in unpublished opinions has "repeatedly relied on *Lueras* to find there is no duty of care in the loan modification process." *Newman v. Bank of N.Y. Mellon*, 2017 WL 1831940, at *11 (E.D. Cal. May 8, 2017) (collecting cases); *see Deschaine v. IndyMac Morg. Servs.*, 617 F. App'x 690, 692 (9th Cir. 2015) (citing *Lueras* for the proposition that "IndyMac had no duty to offer Deschaine a loan modification based on an income determined by Deschaine or to handle Deschaine's loan 'in such a way to prevent foreclosure and forfeiture of his property'").

The Court need not decide whether *Lueras* or *Alvarez* is more persuasive. Even assuming that *Alvarez* is correct that a lender owes a borrower a duty of care in some circumstances, Plaintiffs have not a shown a likelihood of success on the merits of their negligence claim because those circumstances are not present in this case. Plaintiffs assert in their TRO motion and supporting declaration only that Plaintiffs learned in 2015 that Ocwen offered Plaintiffs a loan modification trial payment plan on September 14, 2012, but Plaintiffs never received this loan modification offer. *See* ECF No. 46-2, at ¶¶ 5–9. [1] Plaintiffs state in their declaration only that Ocwen could "not provide [Plaintiffs with] any tracking information for the approval package" that Ocwen claims was sent to Plaintiffs on September 14, 2012. *Id.* Plaintiffs thus infer that the offer was never sent to Plaintiffs. *See* FAC ¶ 24.

By contrast, the plaintiffs in *Alvarez* alleged that the lender had failed to review the plaintiffs' loan modification application in a timely manner, foreclosed on the plaintiffs' property

[1] Plaintiffs copy portions of their FAC allegations into their TRO motion without further argument or discussion. *See* TRO Mot. at 8–9. Portions of these allegations conclusively state that Ocwen "wrongfully claimed that it could no longer approve Plaintiffs for a HAMP modification," *see* TRO Mot. at 9, but Plaintiffs do not provide any further argument or detail. Moreover, Plaintiffs' declaration in support of their TRO motion does not discuss this allegation at all, but is rather limited only to Ocwen's failure to send notice of the September 14, 2012 loan modification offer to Plaintiffs. *See* ECF No. 46-2. Thus, because Plaintiffs have "submit[ted] no evidence to substantiate [their] claim" regarding Ocwen's claim that it could not approve Plaintiffs for a HAMP modification, and because Plaintiffs' TRO motion and FAC's allegations are conclusory as to this argument, Plaintiffs have "fail[ed] to establish any chance of success, much less a likelihood of success." *McCarthy v. Servis One, Inc.*, 2017 WL 897422, at *1 (N.D. Cal. Mar. 7, 2017).

while the plaintiffs were still under consideration for a HAMP modification, relied on incorrect information in handling plaintiffs' application, and falsely advised plaintiffs that no documents had been submitted for review. *See Alvarez*, 228 Cal. App. at 945. These alleged acts of misconduct are far from Plaintiffs' allegations here. *See id*; *see also Breining v. Ocwen Loan Serv., LLC*, 2015 WL 1405501, at *6 (E.D. Cal. Mar. 26, 2015) (finding plaintiffs failed to plead facts plausibly suggesting their case was similar to *Alvarez*, which involved the lender foreclosing while Alvarez was "under consideration for a HAMP modification" and using "incorrect figures for Alvarez's monthly gross income").

Moreover, unlike the plaintiffs in *Alvarez*, Plaintiffs' complaint and declaration in support of their TRO motion do not show that Ocwen's alleged misconduct "deter[ed] Plaintiffs from seeking other remedies to address their default." *Alvarez,* 228 Cal. App. at 945; *see also Pimentel v. Wells Fargo Bank, N.A.*, 2016 WL 8902601, at *8 (N.D. Cal. Dec. 6, 2016) (finding plaintiffs allegations to be distinguishable from *Alvarez* because "there [was] no allegation or evidence that Plaintiff was induced to default or promised a modification which caused her to forego some other option to avoid foreclosure"). To the contrary, as the complaint makes clear, Plaintiffs have applied for various forms of loan modifications for the last *five years*, Plaintiffs received other loan modification offers, Plaintiffs have continually received postponement of foreclosure, and Plaintiffs have remained in their home since defaulting on their loan on March 1, 2009 (over eight years ago) and a Notice of Default and Election to Sell Under Deed of Trust was recorded on March 2, 2011 (over six years ago). *See generally* FAC; ECF No. 52-2. Accordingly, the Court concludes that Plaintiffs have failed to show a likelihood of success in demonstrating that Ocwen "exceed[ed] the scope of its conventional role as a mere lender of money" such that Ocwen owed Plaintiffs a duty of care. *Alvarez*, 228 Cal. App. 4th at 944.

In addition, even if Ocwen did owe Plaintiffs a legal duty, the Court finds that Plaintiffs have failed to establish a likelihood of success on the merits of their claim that Ocwen breached that legal duty. Ocwen supports its opposition to Plaintiffs' motion for TRO with a declaration that avers that "Ocwen's servicing notes indicate[] the [loan modification] offer was printed and

sent to Plaintiffs on or about September 14, 2012." *See* Ocwen Decl., at ¶ 6. Ocwen attaches these servicing notes to its declaration, and Ocwen also attaches a copy of the letter that was mailed to Plaintiffs on September 14, 2012. *See id.*, Exs. A & B. By contrast, Plaintiffs argue only that they never received the home loan modification offer, and Plaintiffs speculate that it was never sent by Ocwen. *See* ECF No. 46-2.

Apart from Plaintiffs' speculation, the only evidence provided by Plaintiffs in support of their argument that Ocwen breached a duty of care is a letter that Ocwen sent borrowers on April 20, 2017. This letter states that "[b]etween January 1, 2012 and December 31, 2014, some Ocwen letters . . . included inaccurate letter dates and deadlines." *See* ECF No. 46-3. Ocwen's April 20, 2017 letter invited borrowers to submit a claim if they received a misdated letter from Ocween between 2012 and 2014. *Id.* However, contrary to Plaintiffs' argument, Ocwen's April 20, 2017 letter does not show that Ocwen breached a duty of care owed to Plaintiffs. Ocwen's April 20, 2017 letter was sent to *all* borrowers, and Plaintiffs do not allege that they themselves received any misdated letter from Ocwen. *See id.* Accordingly, Ocwen's April 20, 2017 about misdated letters, which was sent to all borrowers, provides little support for Plaintiffs claim that Ocwen breached a duty of care to Plaintiffs in this case by not sending Plaintiffs a home modification offer on September 14, 2012.

Thus, the Court finds that, even if Ocwen did owe a legal duty to Plaintiffs, the Plaintiffs have failed to establish a likelihood of success on the merits of showing that Ocwen breached a duty of care owed to Plaintiffs. Accordingly, Plaintiffs have failed to establish a likelihood of success on the merits of their negligence claim. The Court next turns to Plaintiffs' claim against Ocwen under the UCL.

**2. UCL**

California's UCL prohibits business practices that are "unfair, unlawful or fraudulent." Cal. Bus. & Prof. Code § 17200. Although the precise basis for Plaintiffs' UCL claim is unclear from Plaintiffs' Complaint and motion for TRO, Plaintiffs appear to bring a UCL claim under the "unlawful" and "unfair" prongs. *See* FAC ¶¶ 77 (alleging Ocwen's "unlawful and unfair business

practices").

First, to the extent that Plaintiffs bring this claim under the "unlawful" prong, Plaintiffs have failed to show a likelihood of success on the merits because Plaintiffs have not shown a likelihood of success on the merits of establishing that Ocwen violated any other law. "Under the UCL's 'unlawful' prong, violations of other laws are 'borrowed' and made independently actionable under the UCL." *Herron v. Best Buy Co., Inc.*, 924 F. Supp. 2d 1161, 1177 (E.D. Cal. Feb. 14, 2013). Other than Plaintiffs' UCL claim against Ocwen, Plaintiffs' TRO motion addresses only Plaintiffs' negligence claim against Ocwen. As discussed above, Plaintiffs have not shown a likelihood of success on the merits of their negligence claim against Ocwen, and Plaintiffs have not set forth any allegations or evidence demonstrating a likelihood of success in showing that Ocwen violated any other law. Accordingly, Plaintiffs have failed to establish a likelihood of success on the merits of Plaintiffs' claim that Ocwen violated the "unlawful" prong of the UCL. *Singh v. Wells Fargo Bank, N.A.*, 2009 WL 2365881, at *5 (N.D. Cal. July 30, 2009) (dismissing UCL claim because Plaintiff failed to show the defendant committed any underlying violation of law).

Second, to the extent that Plaintiffs bring this claim under the "unfair" prong, Plaintiffs have also failed to show a likelihood of success on the merits. "A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1473 (Cal. Ct. App. 2006). Again, Plaintiffs allege only that they did not receive notice of a September 14, 2012 loan modification offer from Ocwen. By contrast, Ocwen attaches to its opposition a declaration stating that "Ocwen's servicing notes indicate[] the [HAMP] offer was printed and sent to Plaintiffs on or about September 14, 2012." *See* Ocwen Decl., at ¶ 6. Ocwen attaches these servicing notes to its declaration, and Ocwen also attaches a copy of the letter that was mailed to Plaintiffs on September 14, 2012. *See id.*, Exs. A & B. The Court thus concludes that Plaintiffs have failed to show a likelihood of success on their claim that Ocwen's business practices are "immoral, unethical, oppressive or unscrupulous and

cause injury to [Plaintiffs] which outweigh its benefits." *McKell*, 142 Cal. App. 4th at 1473; *see Clark v. Wachovia Mortg.*, 2011 WL 9210348, at *2 (C.D. Cal. June 9, 2011) (finding plaintiffs could not state UCL claim under "unfair" prong where plaintiff alleged without further detail that Wachovia made "misrepresentations" to plaintiff about HAMP guidelines).

**C. Summary**

In sum, the Court concludes that Plaintiffs' motion for TRO fails because Plaintiffs have failed to demonstrate that the injunction that they seek will remedy their alleged harm because Defendants are no longer the servicers of Plaintiffs' loan. Indeed, the Court is troubled that Plaintiffs knew that neither Ocwen nor BSI was the current servicer of Plaintiffs' home loan, yet filed the instant motion for TRO, on an ex parte basis, without disclosing that crucial fact. The Court also denies Plaintiffs' motion for the separate and independent reason that Plaintiffs have failed to establish a likelihood of success on the merits of their claims against Ocwen for negligence or violation of the UCL.

**IV. CONCLUSION**

For the foregoing reasons, Plaintiffs' motion for TRO is DENIED.

**IT IS SO ORDERED.**

Dated: July 14, 2017

Lucy H. Koh

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California