

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 21-1087

(8:14-cv-03667-TJS)

PIA MCADAMS)
Appellant)
)
v.)
)
DEMETRIUS ROBINSON; TAMARA ROBINSON)
Plaintiffs-Appellees)
)
v.)
)
NATIONSTAR MORTGAGE, LLC,)
Defendant-Appellee)
)
)

**APPELLANT PIA MCADAMS’
MOTION TO TAKE JUDICIAL NOTICE**

INTRODUCTION

Pursuant to Federal Rule of Evidence 201, Appellant Pia McAdams (“Appellant”) respectfully requests that the Court take judicial notice of the following document.

1. A true and correct copy of Nationstar Mortgage, LLC d/b/a Mr. Cooper’s Memorandum of Law in Support of its Motion to Dismiss Plaintiff’s Amended Complaint that was filed on February 4, 2021 in the matter of *Pia McAdams v. Nationstar Mortgage, LLC*, Case No. 3:20-cv-02202-L-BLM (S.D. Cal.) (ECF No. 20-1), which is attached hereto as **Exhibit 1**.

LEGAL STANDARD

Generally, a court must take judicial notice if a party requests it and provides the Court with the requisite information. Fed. R. Evid. 201(c)(2). “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). A court may take “judicial notice at any stage of the proceedings[,]” Fed. R. Evid. 201(d), including on appeal. *See Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989)

ARGUMENT

Nationstar’s Memorandum of Law in Support of its Motion to Dismiss in the *McAdams* case is relevant to the present action because it shows that Nationstar is arguing that Ms. McAdams’ claims—including her wrongful foreclosure claims—should be precluded by the settlement release that is at issue in this matter. For example, Nationstar argues that Ms. McAdams’ “claims arise out of Nationstar’s processing of her loss mitigation application, and thus, are encompassed by this release.” Ex. 1 at p. 5. Nationstar further argues that Ms. McAdams’ “claims clearly arise out of the same ‘nucleus of facts’ at issue in the *Robinson* matter, which is the procedures by which Nationstar processes loss mitigation applications and the effect those procedures have on a borrower’s ability to avoid foreclosure.” Ex. 1 at p. 7.

Nationstar’s Memorandum of Law in Support of its Motion to Dismiss in the *McAdams* case is a publicly filed court record and is the proper subject of judicial notice. *See Lolavar v. de Santibanes*, 430 F.3d 221, 224 n. 2 (4th Cir.2005) (taking judicial notice of court records); *Capelton v. Warden*, 670 F. App’x 94, 95 (4th Cir. 2016) (same).

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the Court take judicial notice of the document attached hereto as Exhibit 1.

DATED: August 5, 2021

Respectfully submitted,

/s/ Ronald A. Marron

Ronald A. Marron

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McAdams***

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1), I certify that this Motion is proportionally spaced in Times New Roman, has a typeface of 14 points, and does not exceed 5,200 words.

DATED: August 5, 2021

Respectfully submitted,

/s/ Ronald A. Marron
Ronald A. Marron

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 2021 I filed the foregoing Motion to Take Judicial Notice through the Court's ECF system, and that all counsel of record will be served through that system.

DATED: August 5, 2021

Respectfully submitted,

/s/ Ronald A. Marron
Ronald A. Marron

EXHIBIT 1

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Cooper*

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PIA MCADAMS, on behalf of herself
and those similarly situated,

Plaintiff,

v.

NATIONSTAR MORTGAGE LLC d/b/a
MR. COOPER, a Delaware limited
liability company, and DOES 1 through
10, inclusive,

Defendants.

Case No. 3:20-cv-2202-L-BLM

**NATIONSTAR MORTGAGE LLC
D/B/A/ MR. COOPER'S
MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFF'S
AMENDED COMPLAINT**

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

Date: March 8, 2021

Time: 10:30 a.m.

Judge: The Honorable M. James
Lorenz

Courtroom: 5B

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1 Defendant Nationstar Mortgage LLC d/b/a Mr. Cooper (“Nationstar”), by its
2 attorneys, hereby submits pursuant to Federal Rule of Civil Procedure 12(b)(6) the
3 following Memorandum of Points and Authorities in support of Nationstar’s Motion
4 to Dismiss Plaintiff Pia McAdams’ Amended (“Plaintiff”) Complaint.

5 **I. INTRODUCTION**

6 Plaintiff obtained a mortgage loan in 2004. Since then, Plaintiff has defaulted
7 on the loan three times, and obtained two previous loan modifications. Plaintiff has
8 now filed this putative class action complaint alleging that Nationstar, her loan
9 servicer, committed technical violations of the California Homeowner’s Bill of Rights
10 (“HBOR”) during her third loan modification application review that deprived her of
11 a meaningful opportunity to avoid foreclosure.

12 However, as Plaintiff has previously informed the Court, she belongs to a
13 settlement class in another class action pending in the District of Maryland concerning
14 Nationstar’s processing of loss mitigation applications, *Robinson v. Nationstar*
15 *Mortgage, LLC*, Case No. 8:14-cv-03667. Plaintiff admits that she chose to not opt
16 out of that class. On December 10, 2020, the *Robinson* settlement gained final
17 approval by the District Court. Thus, Plaintiff’s claims are now barred by that order
18 under the doctrine of res judicata.

19 Furthermore, even were Plaintiff’s claims not released in the *Robinson* action,
20 they fail for separate independent reasons. First, Plaintiff’s HBOR claims must be
21 dismissed because Plaintiff previously obtained two separate loan modifications and
22 defaulted on both agreements. These facts demonstrate that Nationstar properly
23 conducted the foreclosure of Plaintiff’s property after trying to work with her to avoid
24 foreclosure on multiple occasions. More importantly, they preclude Plaintiff from
25 obtaining relief under the HBOR. In the amended complaint, Plaintiff claims that the
26 HBOR still applies because she experienced a material change in her financial
27 circumstances between her second and third loan modification applications.
28 However, the facts alleged in the amended complaint and the documents squarely

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1 contradict this allegation. Furthermore, the facts further prove that, even if Plaintiff
2 did experience the alleged change in financial circumstances, she never informed
3 Nationstar of that change. Thus, the HBOR does not apply.

4 Second, Plaintiff’s common law claims for fraud and promissory estoppel fail
5 because Plaintiff cannot establish all the required elements of the claims, such as a
6 false statement or promise, justifiable reliance, and resulting damages. Finally,
7 Plaintiff’s claim for violation of the UCL fails because Plaintiff has not established
8 that Nationstar committed an unlawful, unfair, or fraudulent business practice and
9 because Plaintiff lacks standing to bring the claim given that she did not suffer any
10 monetary damages *as a result* of Nationstar’s conduct.

11 For these reasons, and the reasons set forth below, Nationstar respectfully
12 requests that this Court dismiss all of Plaintiff’s claims with prejudice.

13 II. RELEVANT FACTS

14 A. Facts Relating to Plaintiff’s Loan

15 On August 19, 2004, Plaintiff obtained a first lien loan from American
16 Wholesale Lender, Inc. in the amount of \$308,000.00 (the “Loan”). *See* Amended
17 Complaint (“AC”) at ¶¶ 15. The Loan was secured by a deed of trust (“DOT”)
18 encumbering the real property located at 2121 Fiori Drive, Vista, California 92084
19 (the “Property”). *Id.* at ¶¶ 15-16.

20 **Plaintiff’s First Loan Modification:** Plaintiff first defaulted on the Loan in
21 2010. In connection with her default, Plaintiff applied for and obtained a permanent
22 loan modification from her loan servicer at that time, BAC Home Loans Servicing,
23 LP (the “2010 Modification”). *See* Request for Judicial Notice (“RJN”) at Ex. 1.

24 **Plaintiff’s Second Loan Modification:** In , Plaintiff again faced financial
25 troubles and could not make payments on the 2010 Modification. *See* AC at ¶ 19. On
26 April 23, 2015, she filed for Chapter 13 Bankruptcy in the Southern District of
27 California, Case No. 15-02621-CL13. *Id.* at ¶ 20. At that time, Plaintiff had defaulted
28 on the 2010 Modification and owed payments for the preceding twelve months. *See,*

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1 RJN at Ex. 2 (noting the Loan was due for the April 1, 2014 payment and each
2 payment thereafter). On or about December 8, 2016, Plaintiff entered into a second
3 Permanent Loan Modification with Nationstar (the “2016 Modification”). See RJN
4 at Ex. 3 (reflecting that Deutsche Bank filed an amended proof of claim in Plaintiff’s
5 Bankruptcy updating their secured claim to reflect the Loan’s new balance as agreed
6 to in the 2016 Modification).

7 **Plaintiff’s Third Request for a Permanent Modification of the Loan:** On or
8 about November 2018, Plaintiff defaulted on the 2016 Modification. AC at ¶ 27. As
9 result, Nationstar “referred [Plaintiff’s] account for foreclosure” with Affinia Default
10 Services, LLC, the Loan’s trustee at that time, and recorded a Notice of Default and
11 Election to Sell Under Deed of Trust (“NOD”) on November 19, 2018. See AC at ¶
12 27, Ex. B. The Loan was \$8,408.35 in arrears at the time the NOD was recorded. *Id.*
13 at ¶ 28, Ex. B.

14 Plaintiff admits that Nationstar sent her a third loss mitigation application on
15 December 22, 2018 (the “2019 Application”) and reviewed her submissions. See AC
16 at ¶ 30, Ex C. Importantly, however, the 2019 Application contained the following
17 disclosures:

- 18
- 19 • ***“Nationstar must receive a complete Borrower Response Package in***
20 ***order for Nationstar to begin the evaluation process; and***
- 21 • ***Prior to Nationstar’s receipt of the missing/complete documents, a***
22 ***foreclosure process may be initiated or if the foreclosure has already***
23 ***been initiated, the foreclosure process will continue until all documents***
24 ***are received unless state law provides otherwise.”***

25 See AC at Ex. C (emphasis added).

26 Between January and March 2019, Nationstar and Plaintiff exchanged
27 documents relating to the 2019 Application. See AC at ¶¶ 37-48. On or about
28 February 14, 2019, Nationstar sent correspondence to Plaintiff informing her: (1) that
the Application was incomplete; (2) what information was needed to complete the

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1 Application; and (3) that the additional information had to be submitted no later than
2 March 15, 2019 to complete the Application. *See* AC at ¶¶ 41-42, Ex. E. Several
3 days later, on February 19, 2019, Affinia recorded a Notice of Trustee Sale (the
4 “NOTS”), which set the Property’s sale date for March 22, 2019. *See* AC at ¶ 44, Ex.
5 F.

6 On or about March 8, 2019, Nationstar again informed Plaintiff that the 2019
7 Application remained incomplete because Plaintiff’s profit and loss statement had
8 “missing pages and was not in the correct format.” *Id.* at ¶¶ 48-50, Ex. G. Fourteen
9 days later, the Property was sold at a trustee’s sale pursuant to the NOTS to a third-
10 party purchaser (the “Trustee’s Sale”). *See* AC at ¶ 55, Ex. F.

11 **B. Facts Relating to the *Robinson* Settlement**

12 As Plaintiff previously informed this Court, she received notice of a class
13 action settlement in *Robinson v. Nationstar Mortgage, LLC d/b/a Mr. Cooper*, Case
14 No. 8:14-cv-03667-TDC pending in the District of Maryland on October 1, 2020.
15 Dkt. No. 106, ¶ 9. Plaintiff did not opt out of the *Robinson* settlement despite
16 receiving proper notice and given ample time before the November 27, 2020
17 deadline. Instead, Plaintiff filed this competing class action on November 12, 2020
18 and objected to the proposed settlement in the *Robinson* matter. *See* RJN, Ex. 7.

19 On December 10, 2020, Nationstar received judicial approval of a nationwide
20 class action settlement in the *Robinson* case which resolved all causes of action
21 relating to loss mitigation claims. RJN, Ex. 8. Specifically, the settlement agreement
22 provides that each class member releases Nationstar from:

23 [A]ll actions, causes of action, claims, demands, obligations, or
24 liabilities of any and every kind that were or could have been asserted
25 by the Class Representative or ***Class Members in connection with the***
submission of loss mitigation applications... [including but not limited
26 to] ***claims for statutory or regulatory violations***, the Real Estate
27 Settlement Procedures Act, Regulation X...unfair, abusive, or
deceptive act or practice claims, tort, contract, or other common law
28 ***claims, or violations of any other related or comparable federal, state,***
or local law, statute, or regulation, and any damages... (8.1) (emphasis
added).

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1 *Id.*

2 Plaintiff's claims arise out of Nationstar's processing of her loss mitigation
3 application, and thus, are encompassed by this release. On January 11, 2021, Plaintiff
4 appealed her objection to the *Robinson* settlement. *See* RJN, Ex. 9. Plaintiff's appeal
5 is currently pending.

6 **III. STANDARD OF REVIEW**

7 "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not
8 need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of
9 his 'entitlement to relief' requires more than labels and conclusions, and a formulaic
10 recitation of the elements of a cause of action will not do..." *Bell Atlantic Corp. v.*
11 *Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

12 "To survive a motion to dismiss, 'factual allegations must be enough to raise a
13 right to relief above the speculative level' and must state 'enough facts to state a claim
14 [for] relief that is plausible on its face.'" *Timmons v. Linvatec Corp.*, 263 F.R.D. 582,
15 584 (C.D. Cal. 2010) (citation omitted). "A claim has facial plausibility when the
16 plaintiff pleads factual content that allows the court to draw the reasonable inference
17 the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*,
18 556 U.S. 662, 663 (2009)).

19 "The plausibility standard is not akin to a 'probability requirement,' but it asks
20 for more than a sheer possibility that a defendant has acted unlawfully. Where a
21 complaint pleads facts that are 'merely consistent with' a defendant's liability, it
22 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Timmons*,
23 263 F.R.D. at 584 (quoting *Ashcroft*, 556 U.S. at 678).

24 Dismissal is appropriate when the plaintiff fails to allege, "enough facts to state
25 a claim to relief that is plausible on its face" and therefore fails to "raise a right to
26 relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

27 ///

28 ///

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1 IV. ARGUMENT

2 A. The *Robinson* Settlement Bars Plaintiff’s Claims

3 Res judicata bars all of Plaintiff’s claim because Nationstar obtained a release
4 of the claims in the *Robinson* settlement, which has now been granted final approval.
5 RJN, Ex. 8.

6 Res judicata, or claim preclusion, prevents re-litigation of the same causes of
7 action between the same parties, or parties who are in privity. *Headwaters Inc. v.*
8 *U.S. Forest Serv.*, 399 F.3d 1047, 1051–52 (9th Cir. 2005). The purpose behind the
9 doctrine is to relieve parties of the cost and vexation of multiple lawsuits, conserve
10 judicial resources, prevent inconsistent decisions, and encourage reliance on prior
11 adjudication. *Montana v. United States*, 440 U.S. 147, 153–54 (1979). When
12 considering the effect of prior federal litigation, the Court applies federal preclusion
13 law. *See W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 n.11 (9th Cir. 1992) (“The res
14 judicata effect of federal court judgments is a matter of federal law.”) (citation
15 omitted).

16 A defendant prevails on a res judicata defense where: (1) the same parties, or
17 their privies, were involved in the prior litigation; (2) the prior litigation involved the
18 same claim or cause of action as the second suit; and (3) the prior litigation was
19 terminated by a final judgment on the merits. *See Blonder–Tongue Labs., Inc. v.*
20 *Univ. of Ill. Found.*, 402 U.S. 313, 323–24 (1971). Here, all three elements are clearly
21 met.

22 First, Plaintiff admits that she is a class member in the *Robinson* case. Dkt.
23 No. 106, ¶ 9. And Nationstar is the defendant in both cases. Thus, there can be no
24 dispute that the lawsuits involve the same parties.

25 Second, Plaintiff’s claims fall squarely within the description of the released
26 claims in the *Robinson* settlement. Specifically, the release includes “all claims...that
27 were or could have been asserted by...Class Members in connection with the
28 submission of loss mitigation applications.” RJN at Ex. 6 at ¶ 8.1. Here, Plaintiff’s

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1 claims all arise out of Nationstar’s handling of her 2019 loss mitigation application.
2 The release specifically references the types of claims Plaintiff raises in this lawsuit:
3 “claims for ...statutory violations, unfair, abusive, or deceptive act or practice claims,
4 tort, contract, or other common law claims, or violations of any other related or
5 comparable...state, or local law, statute, or regulation.” As such, on final approval
6 of the *Robinson* settlement, Nationstar obtained a release of these claims. *See Adams*
7 *v. Wells Fargo Bank, N.A.*, No. 13-cv-05164-YGR, 2015 U.S. Dist. LEXIS 40827, at
8 * 6 (N.D. Cal. Mar. 30, 2015) (“[a] court-approved class action settlement bars new
9 claims by members of the class that were released as part of that settlement”).

10 In addition to being expressly identified in the *Robinson* release, it is clear
11 from the pleadings that both cases involve the same claims. Although no one single
12 factor is determinative of whether a successive suit would be barred under res
13 judicata principles, whether the “same transactional nucleus of facts” exists is the
14 most important factor in the analysis. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe*
15 *Reg'l Plan. Agency*, 322 F.3d 1064, 1069 (9th Cir. 2003). Even “[n]ewly articulated
16 claims based on the same nucleus of facts may still be subject to a res judicata finding
17 if the claims could have been brought in the earlier action.” *Id.* at 1078.

18 Here, Plaintiff’s claims clearly arise out of the same “nucleus of facts” at issue
19 in the *Robinson* matter, which is the procedures by which Nationstar processes loss
20 mitigation applications and the effect those procedures have on a borrower’s ability
21 to avoid foreclosure. Not only do the claims arise out of the same nucleus of fact,
22 but they are identical. In *Robinson*, the plaintiffs alleged that Nationstar failed to
23 refrain from moving forward with foreclosure proceedings while a loss a mitigation
24 application or appeal was pending. *See* RJN at Ex. 5, ¶¶ 55-56, 58. The same is true
25 here. *See e.g.*, AC at ¶¶ 121-122.

26 Furthermore, the parties allege identical harm resulting from Nationstar’s
27 alleged conduct. Plaintiff claims, as the *Robinson* plaintiffs did, that Nationstar’s
28 alleged faulty handling of her loss mitigation application deprived her of a

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1 meaningful opportunity to seek out other loss mitigation options prior to the
2 foreclosure of their homes. *See* AC at ¶¶ 1, 13, 61, 64, 123; *see also* RJN at Ex. 5, ¶¶
3 87 (“Nationstar caused the Robinsons to refrain from looking into other loss
4 mitigation options”). When the parties allege the same type of harm resulting from
5 the same conduct, the claims are similar for purposes of res judicata. *See Moreno v.*
6 *Lane Bryant, Inc.*, No. CV 10-09329 GAF (FMOx), 2011 WL 13217973, at *4 (C.D.
7 Cal. Jan. 25, 2011) (explaining that “if two actions involve the same injury to the
8 plaintiff and the same wrong by the defendant” the actions are similar even if
9 plaintiff pleads a different theory of recovery).

10 Third, an approved class action settlement constitutes a final judgment on the
11 merits. *See e.g., Consumer Advoc. Grp., Inc. v. ExxonMobil Corp.*, 168 Cal. App.
12 4th 675, 694 (2008) (“A court-approved settlement acts as a final judgment on the
13 merits for the purposes of res judicata.”); *Tritz v. U.S. Postal Serv.*, 721 F.3d 1133,
14 1141 (9th Cir. 2013). Plaintiff’s subsequent appeal of the final approval order does
15 not change its preclusive effect. *See Perugini v. Safeway Stores, Inc.*, 933 F.2d 1015,
16 1015 (9th Cir. 1991) (“‘until and unless’ a federal judgment is reversed, an appeal
17 does not detract from its ‘decisiveness and finality’”) (citing *Huron Holding Corp. v.*
18 *Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941); *Robi v. Five Platters, Inc.*,
19 838 F.2d 318, 327 (9th Cir.1988) (pending appeal does not alter preclusive effect of
20 district court judgment). Given that Plaintiff’s claims are barred by the release
21 contained in the *Robinson* settlement, all of his claims must be dismissed with
22 prejudice. *See e.g., Zakinov v. Blue Buffalo Pet Prods., Inc.*, No. 17-CV-01301-AJB-
23 WVG, 2018 WL 1426932, at *7 (S.D. Cal. Mar. 22, 2018) (dismissing claims barred
24 by class action settlement *with prejudice* because any further amendment would be
25 futile) (emphasis added).

26 **B. Plaintiff’s Claims Must Be Dismissed for Other Independent Reasons**

27 Even were the Court to find that Plaintiff’s claims are somehow not precluded
28 by the *Robinson* settlement, they all fail for independent reasons identified below.

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1 **1. Plaintiff’s HBOR Claims Must Be Dismissed Because Plaintiff**
2 **Defaulted on Her Previous Loan Modification Agreements.**

3 In the Amended Complaint, Plaintiff alleges a violation of HBOR section
4 2923.6 in connection with Nationstar’s review of her *third loan modification*
5 *application*, i.e. the 2019 Application.

6 **i. The HBOR Does Not Apply Because Plaintiff Defaulted**
7 **on Two Previous Loan Modifications**

8 The HBOR imposes specific notice and conduct requirements on loan servicers
9 for foreclosure proceedings. However, the HBOR does not apply in all
10 circumstances. As relevant to this case, it does not apply to instances where the
11 borrower has already been reviewed for, received, and defaulted on a previous loan
12 modification. Specifically, the HBOR states that “[i]n order to minimize the risk of
13 borrowers submitting multiple applications for first lien loan modifications for the
14 purpose of delay, *the mortgage servicer shall not be obligated to evaluate*
15 *applications from borrowers who have been evaluated or afforded a fair*
16 *opportunity to be evaluated consistent with the requirements of this section...*” Cal.
17 Civ. Code § 2923.6(g) (emphasis added). Courts have interpreted this language to
18 mean that the HBOR requirements do not apply “where a plaintiff has already
19 obtained and defaulted on a prior loan modification.” *See Fernandez v. Citigroup*
20 *Mortg. Loan Tr., Inc.*, No. SACV1902519DOCJDE, 2020 WL 6162149, at *4 (C.D.
21 Cal. Aug. 17, 2020) (citing *Darsaw v. Wells Fargo Bank, N.A.*, No. 8:19-cv-01252-
22 JLS-JDE, 2019 WL 6391520, at *3 (C.D. Cal. Sept. 3, 2019) (finding that the HBOR
23 did not apply where the plaintiff defaulted on an earlier loan modification
24 agreement)).

25 Relying on this language, courts routinely dismiss HBOR claims when a
26 previous modification review has occurred and/or the borrower has defaulted on a
27 previous modification. *See Fernandez*, 2020 WL 6162149, at *4 (dismissing Section
28 2923.6 claim because plaintiff obtained a previous loan modification); *Ogamba v.*

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1 *Wells Fargo Bank, N.A.*, 2019 U.S. Dist. LEXIS 1448342018 U.S. Dist. LEXIS
2 11734, at *7 (E.D. Cal. Jan. 23, 2018) (same); *Darsow v. Wells Fargo Bank, N.A.*, No.
3 8:19-cv-01252-JLS-JDE, 2019 U.S. Dist. LEXIS 209411, at *6 (C.D. Cal. Sept. 3,
4 2019) (dismissing Section 2923.6 and 2924.10 claims based on default of previous
5 loan modification); *Montes v. Wells Fargo Bank, N.A.*, No. 2:16-CV-01405-KJM-AC,
6 2017 U.S. Dist. LEXIS 174475, at *13-14 (E.D. Cal. Oct. 19, 2017) (“[Section]
7 2923.6 does not apply where, as here, a plaintiff has already defaulted on prior loan
8 modifications”) (citations omitted); *Martia v. Specialized Loan Servicing, LLC*, No.
9 CV188875MWFPLAX, 2019 WL 4132500, at *6 (C.D. Cal. June 10, 2019)
10 (dismissing HBOR claims without leave to amend where Plaintiff had received a
11 previous loan modification and thus “was already aware of his foreclosure
12 alternatives”).

13 Here, Plaintiff cannot dispute the fact that she obtained two previous
14 modifications of the Loan, the 2010 Modification and the 2016 Modification, and
15 defaulted on both modification agreements. *See* RJN at Exs. 1, 3. For this reason
16 alone, all of Plaintiff’s HBOR claims must be dismissed.

17 **ii. Plaintiff Did Not Communicate a Change in Financial**
18 **Circumstance to Nationstar**

19 In the Amended Complaint, Plaintiff contends that despite her multiple defaults
20 on her previous loan modifications, Section 2923.6 still applies because she
21 experienced a change in financial circumstances. However, a mere change in
22 financial circumstances is not sufficient to invoke the exception provided by Section
23 2923.6(g). Section 2923.6(g) applies when the borrower experiences “a material
24 change in the borrower’s financial circumstances *since the date of the borrower’s*
25 *previous application* and that *change is documented by the borrower and submitted*
26 *to the mortgage servicer.*” (emphasis added)). In other words, it does not apply where
27 a borrower has *not communicated* a change in financial circumstance to his or her loan
28 servicer, or alleged that he or she provided documentation reflecting that change. *See*

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1 *Alvarez v. Wells Fargo Bank, N.A.*, No. 2:15-CV-00943-TLN-DB, 2020 WL
2 1700002, at *6 (E.D. Cal. Apr. 8, 2020). Here, the facts alleged in the Amended
3 Complaint, as well as the exhibits attached, squarely contradict Plaintiff’s claim that
4 this exception applies.

5 First, Plaintiff claims she lost her primary source of income “near the end of
6 2017” and that she informed Nationstar of this change in her January 16, 2019
7 hardship letter. *See* AC at ¶¶ 89, 119. But Plaintiff’s hardship letter makes no mention
8 of any sudden loss of primary income, or any specific change in financial
9 circumstance that occurred in 2017. *See* AC at Ex. D. Thus, it cannot be considered
10 valid notification of Plaintiff’s alleged loss of income. *See Ivey v. JP Morgan Chase*
11 *Bank, N.A.*, No. 16-CV-00610-HSG, 2016 WL 4502587, at *4 (N.D. Cal. Aug. 29,
12 2016))) (“plaintiff must allege a specific change in financial circumstance that was
13 documented and submitted to the mortgage servicer, rather than providing a
14 ‘barebones explanation.’”) (quoting *Gilmore v. Wells Fargo Bank N.A.*, 75 F. Supp.
15 3d 1255, 1264-65 (N.D. Cal. 2014; *see also Travis v. Nationstar Mortg. LLC*, No.
16 215CV06516ABKS, 2019 WL 7188573, at *9 (C.D. Cal. Nov. 27, 2019) (finding that
17 conclusory assertions of material changes are insufficient to satisfy Section
18 2923.6(g).)

19 Furthermore, the January 2019 letter disproves Plaintiff’s allegation that she
20 suffered a financial hardship in 2017. In the 2019 letter, Plaintiff admits that her
21 financial hardship began *after* her April 2015 bankruptcy (i.e. before her second loan
22 modification application submitted in 2016), not in 2017 as Plaintiff now claims. *See*
23 RJN, Ex. 3; AC at Ex. D. Put simply, January 16, 2019 hardship letter did not notify
24 Nationstar of any material change in financial circumstance that occurred *since her*
25 *previous loan modification* as required by Section 2923.6(g). Thus, no exception
26 applies and Plaintiff’s defaults on her previous loan modifications bars her HBOR
27 claims relating to her third loan modification application.

28 **2. Plaintiff’s Fraud Claims Fail As A Matter of Law.**

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1 Plaintiff alleges two fraud claims for intentional and negligent
2 misrepresentation. *See*, AC at ¶¶ 126-145. “The elements of a cause of action for
3 intentional misrepresentation are (1) a misrepresentation, (2) with knowledge of its
4 falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4)
5 actual and justifiable reliance, and (5) resulting damage.” (citation omitted). *Daniels*
6 *v. Select Portfolio Serv., Inc.*, 246 Cal. App. 4th 1150, 1166 (2016). “The elements of
7 a claim for negligent misrepresentation are nearly identical. Only the second element
8 is different, requiring the absence of reasonable grounds for believing the
9 misrepresentation to be true instead of knowledge of its falsity.” *Id.* (citation omitted).

10 In Plaintiff’s original complaint, she alleged that Nationstar “misrepresented
11 that when a borrower submitted a completed loan modification application within the
12 timeframe specified, Nationstar would evaluate all loss mitigation options and inform
13 the borrower of their options.” Compl. at ¶¶ 177, 188. In the Amended Complaint,
14 Plaintiff now claims that Nationstar “misrepresented that it would halt the foreclosure
15 proceeding if Plaintiff...submitted the documents requested by Nationstar within the
16 timeframes specified by Nationstar.” AC at ¶ 128. Plaintiff further alleges that, as a
17 result of her reliance on this false statement, she did not seek out other options to
18 prevent the foreclosure of [her] home and suffered the loss of her home to a
19 foreclosure. *See* AC at ¶¶ 135, 145.

20 Plaintiff’s fraud claims fail because they do not satisfy Federal Rule of Civil
21 Procedure 9(b)’s heightened pleading requirements and because Plaintiff cannot
22 establish justifiable reliance or resulting damages.

23 **i. Plaintiff’s Fraud Claims Do Not Satisfy FRCP Rule**
24 **9(b)’s Heightened Pleading Requirements.**

25 Federal Rule of Civil Procedure Rule 9(b) imposes a heightened pleading
26 requirement for claims of fraud. Specifically, Rule 9(b) requires a plaintiff to “state
27 with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P.
28 9(b). A party must set forth “the time, place, and specific content of the false

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1 representations as well as the identities of the parties to the misrepresentation.” *Odom*
2 *v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007) (citation omitted). In a fraud
3 action against a corporation, a plaintiff must “allege the names of the persons who
4 made the allegedly fraudulent representations, their authority to speak, to whom they
5 spoke, what they said or wrote, and when it was said or written.” *Tarmann v. State*
6 *Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991) (citation omitted).

7 Plaintiff’s Amended Complaint does not specifically identify what
8 representation Nationstar made or why it was false. For this reason alone, Plaintiff’s
9 fraud claims should be dismissed. *See e.g., Deschaine*, 617 F. App’x at 692 (Plaintiff
10 “failed to allege with sufficient particularity the ‘who, what, when, where, and how’
11 of the alleged statements made by [defendant servicer’s] representatives as required
12 by the heightened pleading standards.”). The apparent basis for Plaintiff’s fraud
13 claims is a series of alleged violations of the HBOR that resulted in her not pursuing
14 other loss prevent options. AC at ¶¶ 126-145. This Court has previously dismissed
15 fraud claims based on similar allegations. *See Santana v. BSI Fin. Servs., Inc.*, No.
16 20CV1577-GPC(WVG), 2020 WL 6150473, at *13 (S.D. Cal. Oct. 20, 2020) (finding
17 that alleged violations of the HBOR do not constitute acts of fraud or concealments
18 of fact).

19 In the Amended Complaint, Plaintiff contends that, based on a comprehensive
20 reading of “Nationstar’s Borrower Response Package letter and the document request
21 letters,” McAdams believed that so long as she submitted information requested by
22 Nationstar, “Nationstar would then halt the foreclosure process while evaluating her
23 loss prevention options.” AC at ¶¶ 46, 130. However, nowhere in those
24 communications did Nationstar inform Plaintiff that it would halt the foreclosure
25 process. In fact, those communications contained language indicating just the
26 opposite.

27 Specifically, the Borrower Response Package states:
28

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- 1 - “Prior to our receipt of the missing/complete documents, a foreclosure
2 process may be initiated or *if the foreclosure has already been initiated,*
3 *the foreclosure process will continue until all document are received*”;
- 4 - **“What if My Property Is Scheduled For a Foreclosure Sale in the**
5 **Future?** If your lender receives a complete [application] and the supporting
6 documents it requires with only 37 or fewer calendar days before a
7 scheduled foreclosure sale, there is no guarantee it can evaluate you for a
8 foreclosure alternative in time to stop the foreclosure sale. Even if the lender
9 is able to approve you for a foreclosure alternative prior to a sale [the parties
10 responsible for the sale] may not halt the scheduled sale.” AC at Ex. C
11 (emphasis added).

12 Furthermore, Nationstar’s letters requesting additional documents from Plaintiff, sent
13 on February 14, 2019 and March 8, 2019 respectively, do not contain any promises to
14 halt Plaintiff’s foreclosure process. *See* AC at Exs. G and E.

15 On February 19, 2019, a Notice of Trustee’s Sale was recorded informing
16 Plaintiff that the sale of her property was scheduled for March 22, 2019. AC at Ex.
17 F. As of March 8, 2019, fourteen (14) days before the scheduled foreclosure sale,
18 Plaintiff had not submitted a complete loss mitigation application. *Id.* at Ex. E (“We
19 have determined that your loss mitigation is incomplete...”); *see also Travis v.*
20 *Nationstar Mortg. LLC*, No. 215CV06516ABKS, 2019 WL 7188573, at *8 (C.D. Cal.
21 Nov. 27, 2019) (finding a loan modification application to be incomplete when “there
22 [was] no indication that [the defendant] ever indicated it was complete.”). Put simply,
23 Plaintiff has not identified when, how, and where Nationstar informed her that the
24 foreclosure sale of her home would be “halted” under any circumstances. Instead, a
25 review of the communications contained in the Amended Complaint makes clear that
26 Nationstar clearly informed Plaintiff that the foreclosure sale would not be postponed
27 if, as here, Plaintiff did not submit a complete application within thirty-seven (37)
28 days of the scheduled foreclosure sale.

1 Because Plaintiff has not identified a specific false statement that Nationstar
2 knowingly made, her claims for negligent and intentional misrepresentation
3 necessarily fail.

4 **ii. Plaintiff Cannot Identify Any Justifiable Reliance or**
5 **Resulting Damages.**

6 Plaintiff’s fraud claims fail for the additional reason that she has not—and
7 cannot—allege actual reliance. “[A]n essential part of a misrepresentation claim is
8 reliance...[i]t is not sufficient to simply allege a false statement and resulting damage;
9 a plaintiff must also allege that he or she relied on the false statements to their
10 detriment.” *Haddock v. Countrywide Bank, NA*, No. CV 14-6452 PSG (FFMx), 2015
11 U.S. Dist. LEXIS 146291, at * 65 (C.D. Cal. Oct. 27, 2015) (citation omitted); *Galvez*
12 *v. Wells Fargo Bank, N.A.*, No. 17-CV-06003-JSC, 2018 WL 2761917, at *9 (N.D.
13 Cal. June 7, 2018) (dismissing negligent misrepresentation claim because plaintiffs
14 “failed to allege any connection between their reliance on the promised loan
15 modifications and any specific damages that reliance caused) (citing *Rossberg v. Bank*
16 *of Am., N.A.*, 219 Cal. App. 4th 1481, 1500 (2013)).

17 Plaintiff alleges that, as a result of Nationstar’s promise to “halt” her foreclosure
18 sale, she “did not seek out other options to prevent the foreclosure of their homes.”
19 AC at ¶ 135. However, the mere conclusory allegation that Plaintiff failed to pursue
20 other options does not satisfy the heightened pleading requirements for a fraud claim.
21 *Dick v. Am. Home. Mortg. Serv. Co.*, No. CIV. NO. 2:13-00201 WBS CKD, 2014
22 U.S. Dist. LEXIS 5437, at *13 (E.D. Cal. Jan. 15, 2014) (Allegations of “other
23 options” insufficient to survive dismissal because plaintiff has not “allege[d] any facts
24 suggesting how pursuing these hypothetical avenues would have prevented the
25 foreclosure of [his] home”); *Newgent v. Wells Fargo Bank, N.A.*, No. 09CV1525
26 WQH, 2010 WL 761236, at *5 (S.D. Cal. Mar. 2, 2010) (“Plaintiff asserts that but for
27 [defendant’s] deception, Plaintiff would have taken legal action ‘to forestall the sale
28

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1 of her home,’ however, she does not allege facts that support a cognizable theory upon
2 which she would have succeeded in preventing the trustee's sale”).

3 Furthermore, Plaintiff’s voluntary decision not to pursue other options, such as
4 the sale of her home, was not *caused* by Nationstar. *See Galvez v. Wells Fargo Bank,*
5 *N.A.*, No. 17-CV-06003-JSC, 2018 WL 2761917, at *9 (N.D. Cal. June 7, 2018)
6 (dismissing negligent misrepresentation claim because plaintiffs “failed to allege any
7 *causal* connection between their reliance on the promised loan modifications and any
8 specific damages) (citing *Rossberg v. Bank of Am., N.A.*, 219 Cal. App. 4th 1481,
9 1500 (2013)). Indeed, Nationstar’s supposed misrepresentations allegedly occurred
10 after Plaintiff defaulted on the Loan, obtained the 2010 Modification, defaulted again,
11 declared bankruptcy, obtained the 2016 Modification, defaulted for a third time, and
12 still sought another loan modification. *See* RJN at Exs. 1, 3. Plaintiff does not identify
13 any particular steps she would have taken but for Nationstar’s alleged
14 misrepresentation. Nor does Plaintiff explain how Nationstar statements prevented
15 her from taking such actions. Without such allegations, a fraud claim cannot survive.

16 Because Plaintiff has not established any detrimental reliance or causal
17 connection between Nationstar’s conduct and her alleged damages, her fraud claims
18 must be dismissed.

19 **3. Plaintiff’s Promissory Estoppel Claim Fails.**

20 Plaintiff’s claim for promissory estoppel is nearly identical to her fraud claim.
21 Plaintiff alleges that Nationstar falsely promised that “if [she] submit[ted] all
22 documents requested by Nationstar by the ‘reasonable date’ provided by Nationstar,
23 Nationstar would halt the foreclosure process.” AC at ¶ 148. “The elements of a
24 promissory estoppel claim are: (1) a promise clear and unambiguous in its terms; (2)
25 reliance by the party to whom the promise is made; (3) [the] reliance must be both
26 reasonable and foreseeable; and (4) the party asserting the estoppel must be injured
27 by his [or her] reliance.” *Daniels*, 246 Cal. App. 4th at 1166. A promise must be
28 “definite enough that a court can determine the scope of the duty, and the limits of

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1 performance must be sufficiently defined to provide a rational basis for the
2 assessment of damages.” *Garcia v. World Sav., FSB*, 183 Cal. App. 4th 1031, 1045
3 (2010) (citation omitted).

4 Plaintiff’s promissory estoppel claim fails because she has not identified a clear
5 and unambiguous promise Nationstar made, and then reneged on. To the extent
6 Plaintiff bases this claim on the Borrower Response Package and Nationstar’s letters
7 requesting additional documents, the claim fails because those communications make
8 no such promises. AC at Exs. C, E, and G. Furthermore, courts have rejected
9 previous attempts to base a promissory estoppel claim on an alleged promise to
10 conduct a loan modification review. *See e.g. Chavez v. CitiMortgage, Inc.*, 2017 WL
11 2171743, at *3 (N.D. Cal. May 17, 2017) (finding that an alleged promise to conduct
12 a loan modification review is not actionable under a promissory estoppel claim as a
13 matter of law); *Hosseini v. Wells Fargo Bank, N.A.*, No. C-13-02066 DMR, 2013 WL
14 4279632, at *6 (N.D. Cal. Aug. 9, 2013) (“The only promise made by Defendant that
15 Plaintiffs identify is the statement that it would provide a ‘good faith evaluation’ of
16 the loan modification application. Although this representation implies something
17 about the future, it is not a clear, unambiguous, enforceable promise that would
18 support a promissory estoppel claim.”); *accord Alvarez v. Nationstar Mortg. LLC*,
19 No. 15-CV-04204-BLF, 2017 WL 1153029, at *4 (N.D. Cal. Mar. 28, 2017).

20 Furthermore, as explained *supra*, Plaintiff has not identified any action she
21 took or failed to take as a result of this alleged promise, and/or any damages caused
22 by that reliance. *See* Section IV.B.2.ii. The mere allegation that she did not “seek
23 out other loss prevention options to prevent foreclosure” is not sufficient. *See*
24 *Compton v. Midland Mortg.*, No. CV1600817RGKJCX, 2016 WL 7479418, at *8
25 (C.D. Cal. Apr. 19, 2016) (finding that a conclusory allegation that plaintiff “forwent
26 other alternatives in reliance on” the alleged promise insufficient where no facts
27 suggested that plaintiff could have avoided foreclosure); *Thu Ha Nong v. Wells Fargo*
28 *Bank, N.A.*, No. SACV101538JVSMLGX, 2010 WL 11582980, at *3 (C.D. Cal. Dec.

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1 6, 2010) (finding the plaintiff's allegations that “she relied on [Defendant’s]
2 statements ‘by not pursuing other strategies’ to avoid foreclosure” insufficient
3 because “[she did] not ‘allege facts that could establish that she would have been
4 successful in delaying the foreclosure sale, renegotiating her loan, and retaining
5 possession of her home[.]”); *Newgent v. Wells Fargo Bank, N.A.*, No. 09CV1525
6 WQH, 2010 WL 761236, at *7 (S.D. Cal. Mar. 2, 2010) (same).

7 Because Plaintiff has not identified an unambiguous promise, justifiable
8 reliance, or resulting damages, her claim for promissory estoppel must be dismissed.

9 **4. Plaintiff’s UCL Claim Must Be Dismissed.**

10 The UCL prohibits business practices that are unlawful, unfair, or fraudulent.
11 Cal. Bus. & Prof. Code § 17200. Plaintiff alleges that Nationstar violated the UCL
12 by: (1) failing to comply with the HBOR; (2) failing to abide with applicable
13 foreclosure procedures; and (3) preventing Plaintiff from pursuing alternative options
14 to prevent the Trustee’s Sale. *See* AC at ¶¶ 154-167. Plaintiff’s claim fails because
15 she has not sufficiently alleged an unfair business practice and because she lacks
16 standing to bring the claim.

17 First, as explained *supra*, Plaintiff has not stated a valid claim for violation of
18 the HBOR or any of her common law claims. Since Plaintiff has not stated a
19 cognizable claim for any legal violation, the Court must dismiss the derivative UCL
20 claim. *See, e.g., Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal. App. 4th 1050,
21 1060 (2005) (“If the [underlying] claim is dismissed, then there is no ‘unlawful’ act
22 upon which to base the derivative [UCL] claim.”); *Pantoja v. Countrywide Home*
23 *Loans, Inc.*, 640 F. Supp. 2d 1177, 1190–91 (N.D. Cal. 2009) (dismissing UCL claim
24 because court dismissed “all . . . predicate violations”).

25 Second, Plaintiff lacks statutory standing to bring a UCL claim. The UCL
26 confers statutory standing on “any ‘person who has suffered injury in fact and has
27 lost money or property’ as a result of unfair competition.” *Kwikset Corp. v. Super.*
28 *Ct.*, 51 Cal.4th 310, 320–21 (2011) (citing Cal. Bus. & Prof. Code § 17204). In

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1 *Kwikset Corp.*, the California Supreme Court explained that there is a “simple test”
2 for determining whether the UCL’s standing requirement is met. *Id.* at 322. A
3 plaintiff must now: “(1) establish a loss or deprivation of money or property sufficient
4 to qualify as injury in fact, *i.e.*, economic injury, and (2) show that that economic
5 injury was the result of, *i.e.* caused by, the unfair business practice or false advertising
6 that is the gravamen of the claim.” *Id.* at 322. The causal connection required under
7 this test “is broken when a complaining party would suffer the same harm whether or
8 not a defendant complied with the law.” *Daro v. Super. Ct.*, 151 Cal. App. 4th 1079,
9 1099 (2007).

10 Plaintiff alleges that, as a result of Nationstar’s alleged violation of the UCL
11 she suffered the lost opportunity to seek foreclosure avoidance alternatives and the
12 loss of her home at a foreclosure sale. AC at ¶ 164. However, a lost “opportunity”
13 is not the type of economic injury required to bring a claim under the UCL. *Kwikset*
14 *Corp.*, 51 Cal. 4th at 320–21. Furthermore, Plaintiff concedes that she repeatedly
15 defaulted on her loan agreement. *See* AC at ¶¶ at 19, 27; *see also*, RJN at Exs. 1, 3.
16 Plaintiff’s failure to make her loan payments caused the foreclosure sale of her
17 property – not any alleged unlawful conduct committed by Nationstar. *See Herrejon*
18 *v. Ocwen Loan Servicing, LLC*, 980 F. Supp. 2d 1186, 1205 (E.D. Cal. 2013)
19 (“Foreclosure of the property fails to support a UCL claim in the absence of
20 allegations of the plaintiffs’ performance to avoid default.”).

21 Accordingly, this Court should dismiss Plaintiff’s claim for violation of the
22 UCL.

23 V. CONCLUSION

24 For the foregoing reasons, Nationstar respectfully requests that this Court grant
25 its Motion, dismiss Plaintiff’s Amended Complaint with prejudice, and enter
26 judgment in favor of Nationstar.

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Dated: February 4, 2021

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