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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES HUTCHINS,
Plaintiff,
v.
NATIONSTAR MORTGAGE LLC, et al.,
Defendants.

Case No. 16-cv-07067-PJH

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

The motion of defendant Nationstar Mortgage LLC ("Nationstar") for an order dismissing the first amended complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim came on for hearing before this court on August 2, 2017. Plaintiff James Hutchins appeared by his counsel Arash Moussavian, and Nationstar appeared by its counsel Megan Kelly. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS defendant's motion.

BACKGROUND

In July 2004, plaintiff James Hutchins financed the purchase of real property located in Livermore, California ("the property") through a first and second combination loan, in the principal amounts of \$958,400.00 ("the Loan") and \$119,680.00, respectively. FAC ¶ 23 & Exh. A; Def's RJN Exh. 1. The Loan was secured by a Deed of Trust, recorded against the property, and memorialized by a promissory note, and the lender was Bank of America, N.A. ("BofA"). See FAC ¶ 23 & Exh. A. The term of the Loan ran to September 1, 2034. FAC Exh. A.

1 The Deed of Trust included an adjustable rate rider, providing that the initial
2 interest rate would be 4.876%, with a possible rate change on September 1, 2009. The
3 period from the origination of the loan through September 1, 2009, was an "interest only"
4 period. Thereafter, during the "amortization" period, the monthly payment would be
5 calculated based on the changed interest rate plus an amount sufficient to repay the
6 capital principal through the life of the loan. See FAC Exh. A.

7 Plaintiff alleges that in late 2008, he and his wife were "feeling the effects of the
8 recession," and he began calling BofA, asking about a loan modification. FAC ¶ 24. He
9 asserts that July 2009, he submitted a complete "loan modification package" to BofA; that
10 he was told he had to be 90 days late (on the payments) before a loan modification could
11 be considered; that he was advised to stop paying his mortgage; and that his last
12 payment on the Loan was made on July 10, 2009. FAC ¶ 24.

13 Plaintiff alleges that on January 5, 2010, he was informed by BofA that his loan
14 modification application was denied. FAC ¶ 25. He claims, however, that the
15 "information" had been incorrectly "inputted" in the system, and was then corrected and
16 resubmitted, and asserts that on March 3, 2010, he was informed that his application was
17 "conditionally approved." FAC ¶ 25. He claims that he "proceeded with the loan
18 modification process for three years until the loan servicing was transferred to Nationstar
19 in November of 2013;" and that he "never received any documentation or information
20 about being denied in his January 10, 2010, submission." FAC ¶ 25.

21 On April 4, 2012, plaintiff "experienced significant hardship" when he lost his job of
22 25 years, without advance notice, which he claims caused him to "fall further behind on
23 the mortgage payments," FAC ¶ 27 (which payments, as alleged in FAC ¶ 24, he had not
24 been making since July 2009). Plaintiff claims that after his loan was "switched to
25 Nationstar" – which he alleges occurred in November 2013, FAC ¶ 25, he obtained
26 gainful employment and his income returned, FAC ¶ 28.

27 Plaintiff asserts that as required by the Homeowners Bill of Rights ("HBOR"),
28 Nationstar provided him with a single point of contact ("SPOC") – an individual by the

1 name of Ms. Karp – but claims that he was never able to reach her. FAC ¶¶ 29-31, 84.
2 He alleges that he tried to follow up with Ms. Karp as to the "ongoing loan modification
3 review that had been submitted to prior servicer BofA, and the status of that review that
4 was ongoing during and after the transfer of servicing to Nationstar." FAC ¶ 30.
5 However, he contends that he received no response to emails sent to Ms. Karp on
6 December 9, 2014, and December 18, 2014. FAC ¶ 30.

7 Plaintiff sent Ms. Karp another email on January 7, 2015, and claims he received a
8 response on January 9, 2015, stating, "You are welcome to contact Nationstar customer
9 [sic] service directly pertaining to your account with us." FAC ¶¶ 30-31. He alleges that
10 although he was informed that Ms. Karp was his SPOC, she "did not fulfill any of her
11 duties under the code," and that he was thereafter "unable to contact anyone at
12 Nationstar familiar with his loan." FAC ¶ 31. He asserts that in July 2015, he sent a letter
13 to Nationstar inquiring about the status of the "ongoing loan modification review," but that
14 "[t]here was no written response from Nationstar on that issue," although Nationstar
15 "continued to send him mortgage statements on a monthly basis." FAC ¶ 32.

16 A Notice of Default and Election to Sell Under Deed of Trust was recorded against
17 the property on November 6, 2015. FAC ¶ 33 & Exh. B; Def's RJN Exh. 6. Plaintiff
18 alleges that the Notice contained a "false declaration" pursuant to California Civil Code
19 § 2923.55(f), signed on January 23, 2015, averring that Nationstar had contacted plaintiff
20 to assess his financial situation and to explore options to avoid foreclosure, and that 30 or
21 more days had passed since those efforts were satisfied. FAC ¶ 33. Plaintiff claims he
22 had no such contact or conversation with Nationstar. FAC ¶ 33.

23 Plaintiff asserts that on December 10, 2015, after receiving the Notice of Default,
24 he called Nationstar and talked with "Faye," who stated that "the records" showed that a
25 loan modification application was submitted, and under review, and that there were no
26 documents showing if it was approved or denied. FAC ¶ 34. Plaintiff claims that "[t]his
27 referred to the loan modification submission that he had submitted to Bank of America,"
28 and asserts that the review was thus "ongoing and continuing when the loan was

1 transferred to Nationstar." FAC ¶ 34. Plaintiff claims he informed "Faye" that the filing of
2 the Notice of Default violated the dual-tracking laws, and "Faye" said she would
3 "escalate" the issue. FAC ¶ 34.

4 Plaintiff asserts that he called Nationstar on December 15, 2015, and spoke with
5 "Monique," who informed him that there had been no response from "escalation[;]" and
6 that he contacted Nationstar on January 5, 2016, and spoke to "Icy," who advised him
7 that the loan modification was "denied." FAC ¶ 35. Plaintiff asserts that this "verbal
8 denial" was improper because "the Code" requires that denials be in writing. FAC ¶ 35.
9 Thereafter, he alleges, he again contacted Nationstar to inquire about a loan
10 modification, and on or around January 22, 2016, submitted a "complete loan
11 modification application." FAC ¶ 36. This application was allegedly denied on March 22,
12 2016, "due to Negative NPV." FAC ¶ 37.

13 On April 21, 2016, plaintiff's counsel Joseph R. Manning, Jr., wrote a letter to
14 Nationstar appealing the March 22, 2016 denial. FAC ¶ 38 & Exh. C. Mr. Manning
15 stated in the April 21, 2016, letter that according to the denial letter (not attached),
16 plaintiff "was 'evaluated for mortgage payment assistance based on the eligibility
17 requirements of Wells Fargo Bank, N.A.' but was declined for HAMP Tiers I and II due to
18 an ineligible mortgage and for a standard modification due to the borrower's 'Negative
19 NPV.'" FAC Exh. C. He added, "[a]s you know, Cal. Civil Code Section 2923.6(f)(3)
20 requires that if a loan modification application is denied due to a net present value
21 calculation, 'a statement that the borrower may obtain all of the inputs used' by written
22 request, must be included in the denial letter[;]" but that the denial letter did not include
23 that statement. FAC Exh. C.

24 Mr. Manning stated further that plaintiff disputed the value in the denial letter for
25 monthly gross income (too low) and property value (too high, considering repairs that
26 were needed). Finally, he stated that in his opinion, plaintiff could qualify for a 2%, 40-
27 year term loan, and requested that Nationstar provide an updated analysis and review
28 based on the information provided in the letter, as well as information regarding all

1 available loan modification options. See FAC Exh. C.

2 On May 27, 2016, Nationstar recorded a Notice of Trustee's Sale. FAC ¶ 39 &
3 Exh. D; Def's RJN Exh. 7. Plaintiff claims that the recording of this Notice violated
4 California Civil Code § 2923.6, which prohibits recording a Notice of Trustee's Sale while
5 an appeal of a denial of a loan modification is pending. See FAC ¶ 39. Plaintiff alleges
6 that on May 27, 2016, his attorneys submitted a "Notice of Error" ("NOE") regarding this
7 violation, but that Nationstar did not rescind the Notice of Sale or the November 2015
8 Notice of Default. FAC ¶ 40. Plaintiff also claims that he had a "sharp change in
9 circumstances" in mid-2016, but that he was "never offered a fair opportunity to be
10 evaluated" and was never evaluated for a "foreclosure prevention alternative." FAC ¶ 41.

11 In the original complaint, plaintiff cited to a letter written by his attorney Mr.
12 Manning to Nationstar on September 6, 2016, stating that a written denial of the loan
13 modification request was never received – only a "supplemental follow-up." See Orig.
14 Cplt ¶ 50 & Exh. C.¹ This letter begins, "In a letter dated August 8, 2016, Nationstar . . .
15 denied the above-referenced borrower [Hutchins] for a loan modification. This letter shall
16 serve both as an appeal and a formal request for additional information regarding the
17 reason or reasons for the denial." Orig. Cplt Exh. C.

18 According to the September 6, 2016, letter, Nationstar's denial letter stated that
19 plaintiff was "not eligible for a loan modification due to negative NPV and that Nationstar
20 is unable to offer a HAMP modification, subject to investor restrictions that were used in
21 the NPV evaluation." Orig. Cplt Exh. C. However, the letter goes on, "we never received
22 a written denial letter, as was claimed in the August 8, 2016 letter. . . . Without the
23 separate non-approval notice, which was never received by our client, we cannot
24 intelligibly understand the process used to make this determination and the claimed
25 investor restrictions." Orig. Cplt Exh. C. Mr. Manning proposed that Nationstar "forgive
26 or defer \$350,000 of the arrears and provide a 2%-3% interest rate for a 40 year term."

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28 ¹ The September 6, 2016, letter was attached to the original complaint, but is not
attached to the FAC.

1 That, he asserted, would make it possible for plaintiff to qualify for a loan he would be
2 able to "continue." Orig. Cplt Exh. C.

3 Plaintiff alleged further in the original complaint that while his counsel sent NOEs
4 to Nationstar in May 2016, Nationstar did not respond until October 6, 2016. See Orig.
5 Cplt ¶¶ 63-64 & Exh. N (Oct. 6, 2016, letter from Nationstar to Mr. Manning, in response
6 to Mr. Manning's letter received by Nationstar on September 7, 2016).² Plaintiff asserted
7 in the original complaint that "since there was no denial letter," he had no time to appeal,
8 and as of the date of the complaint, he did not "know what happened to other loan
9 modification submissions, written denials, and were not provided any information on how
10 to appeal or their procedures for appealing." Orig. Cplt ¶ 64.

11 What Nationstar's October 6, 2016, letter actually said was that Nationstar had
12 reviewed the account and determined that a "printing error" had occurred, which resulted
13 in the actual denial letter not being generated. Nationstar added that it had manually
14 generated the denial letter, and was enclosing it with the October 6, 2016, letter, with an
15 apology for the delay. Orig. Cplt Exh. N. at 1. Nationstar went on to explain that after
16 reviewing the account, it "determined that the denial for modification assistance on July
17 29, 2016, was valid," adding that the account was determined to be ineligible for HAMP
18 Tier I and HAMP Tier II because the unpaid principal balance of the Loan exceeded the
19 program's limit of \$729,750. Id.

20 In response to plaintiff's counsel's claim that Nationstar had failed to review
21 plaintiff for alternative modifications, Nationstar responded that plaintiff was not reviewed
22 for HAMP "due to the aforementioned guidelines" but that he was in fact reviewed for the
23 remaining available modification options. Id. However, the Standard Modification was
24 denied due to negative Net Present Value (NPV) – an analysis that takes into account
25 only gross monthly income and property value. Id. Nationstar then went on to explain in
26 detail how it calculated net monthly income, and stated that the value of the property at

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28 ² The October 6, 2016, letter was attached to the original complaint, but is not attached
to the FAC.

1 that time was \$1.4 million. Id. at 2. Nationstar also provided information regarding how
2 plaintiff could challenge the stated property value used in this calculation. Id.

3 Nationstar added that there were other "loss mitigation alternatives" that might be
4 available, including reinstatement (requiring payment of the total amount delinquent),
5 deed-in-lieu (voluntarily transferring the property to Nationstar to satisfy the debt and
6 avoid foreclosure), and pre-foreclosure/short sale (listing the property for sale and
7 acceptance of sale proceeds by Nationstar in exchange for release of lien, even if less
8 than amount owed). Id. at 2. Nationstar provided a statement of the amount owing (and
9 delinquent); and advised, "If you have any questions regarding payment assistance or
10 the status of the account, you can contact Brenda Mansfield, the assigned Single Point of
11 Contact (SPOC), directly[.]" Id. Nationstar also provided the phone number of the Loss
12 Mitigation Department, and the phone number and contact information for the person
13 writing the letter. Id. at 3.

14 Plaintiff filed the original complaint in Alameda County Superior Court on
15 November 2, 2016. The case was removed to this court on December 9, 2016. Plaintiff
16 asserted nine causes of action. On March 24, 2017, Nationstar filed a motion to dismiss,
17 which was granted in an order issued on May 12, 2017 (the "Order"). The court granted
18 leave to amend as to five causes of action only – (1) dual-tracking in violation of Cal. Civ.
19 Code § 2923.6; (2) failure to provide an SPOC, in violation of Cal. Civ. Code § 2923.7;
20 (3) unfair, unlawful, and fraudulent business acts and practices, in violation of Cal. Bus &
21 Prof. Code § 17200; (4) negligence, and (5) negligent misrepresentation.

22 Plaintiff filed the FAC on June 7, 2017, asserting the five causes of action listed
23 above. Plaintiff also alleges that because of the "substantial arrearages," which include
24 unspecified "unnecessary fees added to the loan balance," he has not been able to cure
25 the default, and he has been unable to negotiate a mortgage payment he can afford.
26 FAC ¶ 42. He remains in possession of the property, and concedes no Trustee's sale
27 has occurred, but he asserts that the Notice of Default has not been rescinded, so
28 "further foreclosure proceedings are anticipated." FAC ¶ 43. He contends that "all

1 foreclosure activity on the property must cease until his "initial application" is fairly and
2 properly evaluated and a written denial is mailed. FAC ¶ 44. Nationstar now seeks an
3 order dismissing the FAC.

4 DISCUSSION

5 A. Legal Standard

6 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
7 alleged in the complaint. Ileto v. Glock, 349 F.3d 1191, 1199-1200 (9th Cir. 2003).

8 Under Federal Rule of Civil Procedure 8, which requires that a complaint include a "short
9 and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ.
10 P. 8(a)(2), a complaint may be dismissed under Rule 12(b)(6) if the plaintiff fails to state a
11 cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal
12 theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013).

13 While the court is to accept as true all the factual allegations in the complaint,
14 legally conclusory statements, not supported by actual factual allegations, need not be
15 accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009); see also In re Gilead Scis.
16 Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008). The complaint must proffer sufficient
17 facts to state a claim for relief that is plausible on its face. Bell Atlantic Corp. v. Twombly,
18 550 U.S. 544, 555, 558-59 (2007) (citations and quotations omitted). A claim has facial
19 plausibility when the plaintiff pleads factual content that allows the court to draw the
20 reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556
21 U.S. at 678 (citation omitted). "[W]here the well-pleaded facts do not permit the court to
22 infer more than the mere possibility of misconduct, the complaint has alleged – but it has
23 not 'show[n]' – that the pleader is entitled to relief." Id. at 679. Where dismissal is
24 warranted, it is generally without prejudice, unless it is clear the complaint cannot be
25 saved by any amendment. Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

26 Review is generally limited to the contents of the complaint, although the court can
27 also consider a document on which the complaint relies if the document is central to the
28 claims asserted in the complaint, and no party questions the authenticity of the

1 document. See Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007). The court may
2 consider matters that are properly the subject of judicial notice, Knieval v. ESPN, 393
3 F.3d 1068, 1076 (9th Cir. 2005); Lee v. City of L.A., 250 F.3d 668, 688-89 (9th Cir. 2001),
4 and may also consider exhibits attached to the complaint, see Hal Roach Studios, Inc. v.
5 Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), and documents
6 referenced extensively in the complaint and documents that form the basis of a the
7 plaintiff's claims. See No. 84 Emp'r-Teamster Jt. Counsel Pension Tr. Fund v. Am. W.
8 Holding Corp., 320 F.3d 920, 925 n.2 (9th Cir. 2003).

9 B. Defendant's Motion

10 Nationstar argues that each of plaintiff's five causes of action should be dismissed
11 for failure to state a claim, and that the entire complaint should be dismissed with
12 prejudice because plaintiff has been given leave to amend and failed to correct the
13 deficiencies in the prior complaint as instructed by the court.

14 1. California Civil Code § 2923.6

15 The first cause of action asserts that Nationstar violated Civil Code § 2923.6,
16 which is part of the HBOR. Section 2923.6 limits the ability of a lender to issue a notice
17 of default or a notice of sale, or conduct a trustee's sale on a "first lien loan modification"
18 until one of three conditions occurs: (1) the mortgage servicer makes a written
19 determination that the borrower is not eligible for a first lien loan modification, and any
20 appeal period has expired; (2) the borrower does not accept an offered first lien loan
21 modification within fourteen days of the offer; or (3) the borrower accepts a written first
22 lien loan modification, but defaults on, or otherwise breaches the borrower's obligations
23 under, the first lien loan modification. See Cal. Civ. Code § 2923.6(c)(1)-(3).

24 Another section of the HBOR, Civil Code § 2924.12, provides that there can be no
25 liability for violation of specified sections of the HBOR, including § 2923.6, where the
26 alleged violation has been "corrected and remedied" prior to the recordation of a trustee's
27 deed upon sale. Cal. Civ. Code § 2924.12(c). Additionally, even where there is liability,
28 the remedies are limited, depending on whether a trustee's deed upon sale has been

1 recorded. See Cal. Civ. Code § 2924.12(a)(1), (b) (Where a trustee's deed upon sale
2 has not been recorded, a borrower is limited to seeking an injunction to enjoin an
3 improper foreclosure. Only where a trustee's deed upon sale has been recorded, can a
4 borrower seek damages for the violation.).

5 In this cause of action, plaintiff alleges that he has never "been fairly evaluated for
6 a foreclosure prevention alternative," and that he has not "been afforded a fair
7 opportunity to be evaluated for a foreclosure prevention alternative." FAC ¶ 72; see also
8 FAC ¶ 77. He asserts that "[t]he loan modification which was started with Bank of
9 America then transferred to Nationstar was not denied in writing prior to Nationstar
10 wrongfully recording the Notice of Default" on November 16, 2015, which he claims
11 constituted "dual tracking." FAC ¶¶ 72, 76. In addition, plaintiff alleges that Nationstar
12 "wrongfully recorded" the Notice of Trustee's Sale before he received the result of his
13 appeal of the loan modification denial. FAC ¶ 73.

14 Further, plaintiff contends that he has experienced a "change in circumstances"
15 which "necessitates another review" under § 2923.6(g), which provides that a lender must
16 evaluate a loan modification application when the borrower has experienced a "change in
17 circumstances" which might make it possible for him to qualify. FAC ¶ 73. He asserts
18 that all foreclosure activity on the property must cease until Nationstar has conducted this
19 further evaluation and has mailed a written denial. FAC ¶ 74. Plaintiff claims that
20 Nationstar "has been notified of [his] material financial change." FAC ¶ 77.

21 Nationstar argues that despite having been given an opportunity to amend his
22 complaint, plaintiff still has not alleged any material violation of the § 2923.6, and has not
23 pled any facts showing how the purported violation of § 2923.6 has injured him. For
24 example, Nationstar asserts, plaintiff has not alleged facts showing that he submitted a
25 complete loan modification application to Nationstar before the Notice of Default was
26 recorded in November 2015. Nationstar notes that the only application plaintiff claims to
27 have been submitted prior to the recording of the Notice of Default was an application
28 submitted to the prior servicer, BofA, in July 2009, several years before the effective date

1 of the HBOR.

2 Moreover, Nationstar asserts, documents incorporated into the original complaint
3 (but omitted in the FAC) demonstrate that Nationstar reviewed plaintiff for a loan
4 modification in or about July 2016. As set forth in the October 6, 2016 letter, appended to
5 the original complaint as Exhibit N, Nationstar conducted a modification review and
6 issued a denial on or about August 8, 2016. Plaintiff appealed the denial, and
7 Nationstar's October 6, 2016, letter affirmed that the denial for modification assistance
8 was valid. See Orig Cplt. Exh. N. It is undisputed that no foreclosure sale has occurred
9 to date. For this reason, Nationstar argues, any alleged violation has been "corrected
10 and remedied prior to the recordation of a trustee's deed upon sale." Cal. Civ. Code
11 § 2924.12(c).

12 With regard to plaintiff's claim that he was never fairly evaluated for a foreclosure
13 prevention alternative, Nationstar argues that the July 2016 review and subsequent
14 denials also refute plaintiff's allegations that no review was conducted and establish that
15 Nationstar complied with the law. See Orig. Cplt Exh. N. Moreover, Nationstar asserts,
16 plaintiff's allegations demonstrate that he has already received all that he may be entitled
17 to under HBOR – i.e., postponement of the foreclosure sale while loss mitigation efforts
18 are explored.

19 In opposition, plaintiff asserts that the FAC alleges that the Notice of Default was
20 recorded prior to any written denial of loan modification, and that the Notice of Trustee's
21 Sale was recorded during the time that plaintiff was appealing the loan modification
22 denial – both of which are violations of § 2923.6. Plaintiff asserts that the remedy for
23 such a violation is for Nationstar to rescind the Notice of Default, which it has not done.
24 As for Nationstar's argument that any violation is not "material," or has been remedied,
25 plaintiff responds that whether a violation is "material" is a question of fact and that every
26 violation that undermines the purpose of the HBOR is material.

27 The court finds that the motion must be GRANTED. Plaintiff alleges no facts
28 showing that he submitted a complete loan modification application to Nationstar before

1 the Notice of Default was recorded on November 16, 2015. The only application
2 allegedly submitted before the recording of the Notice of Default was submitted to BofA in
3 July 2009.

4 As for plaintiff's contention that the proper manner to resolve the dual tracking
5 claim is to require Nationstar to rescind the Notice of Default, the court finds that
6 argument to be without merit. As indicated above, § 2924.12 clearly provides that where,
7 as here, no trustee's deed upon sale has been recorded, the only remedy available for a
8 violation of § 2923.6 (and other sections of the HBOR) is an injunction to enjoin an
9 improper foreclosure. Cal. Civ. Code § 2924.12(a)(1). Moreover, there can be no liability
10 where the alleged violation has been "corrected and remedied" prior to the recordation of
11 a trustee's deed upon sale. Cal Civ. Code § 2924.12(c).

12 Plaintiff cites Hestrin v. Citimortgage, Inc., 2015 WL 847132 at *3 (C.D. Cal. Feb.
13 25, 2015), in support of his argument that the court must order Nationstar to rescind the
14 Notice of Default. In that case, which does not support plaintiff's argument, the court
15 rejected the defendant's contention that it was protected by the safe harbor provision in
16 § 2924.12(c), because there was no allegation that the defendant had corrected or
17 remedied its violation. Id. The court added that "the possibility for remediation does not
18 render an ongoing breach moot[,]" which the court noted could be accomplished by the
19 rescinding of the Notice of Default. Id.

20 Here, by contrast, the allegations in the FAC and documents attached to the FAC
21 and the original complaint show that Nationstar evaluated and denied plaintiff's request
22 for a loan modification prior to the recording of any trustee's deed upon sale. Plaintiff
23 himself has acknowledged that Nationstar invoked the safe-harbor, completing a
24 subsequent loan modification review in or about July 2016, conducting a modification
25 review and issuing a denial letter on August 8, 2016. See Orig. Cplt Exh. N. Plaintiff
26 appealed the denial, and Nationstar affirmed that the denial was valid in the October 6,
27 2016 letter. See id.

28 Thus, as Nationstar points out, while rescinding a Notice of Default might be one

1 way to cure a violation, it is not the only way. Here, because no trustee's sale has
2 occurred, and because Nationstar has denied plaintiff's application for a loan
3 modification, any alleged violation of § 2923.6 has been corrected and remedied prior to
4 the recordation of a trustee's deed upon sale. Because plaintiff has failed to amend the
5 dual-tracking claim as instructed by the court in the May 12, 2017, Order, the court finds
6 that further leave to amend would be futile. The dismissal is with prejudice.

7 Finally, plaintiff asserts that Nationstar failed to examine his application based on
8 his "changed circumstances," in violation of Civil Code § 2923.6(g). Under § 2923.6(g),

9 the mortgage servicer shall not be obligated to evaluate
10 applications from borrowers who have already . . . been
11 evaluated or afforded a fair opportunity to be evaluated
12 consistent with the requirements of this section, unless there
13 has been a material change in the borrower's financial
14 circumstances since the date of the borrower's previous
15 application and that change is documented by the borrower
16 and submitted to the mortgage servicer.

17 Cal. Civ. Code § 2923.6(g) (emphasis added).

18 To seek a review under "changed circumstances," the plaintiff/borrower must
19 allege a specific change in financial circumstances that was documented and submitted
20 to the mortgage servicer, rather than providing a "barebones explanation." Gilmore v.
21 Wells Fargo Bank N.A., 75 F. Supp. 3d 1255, 1264-65 (N.D. Cal. 2014) (internal
22 quotations omitted). For example, informing the lender of a \$2,400 salary increase from
23 new employment and supplying supporting documentation might be sufficient at the
24 pleading stage, see Vasquez v. Bank of America, N.A., 2013 WL 6001924, at *8 (N.D.
25 Cal. Nov. 9, 2013), but a letter from counsel to the lender stating the amount of the
26 borrowers' gross disposable household income, and stating generally that the borrowers
27 had "also been faced with an increase in their expenses," with no supporting details or
28 documentation, would be insufficient, see Williams v. Wells Fargo Bank, N.A., 2014 WL
1568857 at *5 (C.D. Cal. Jan. 27, 2014).

Here, plaintiff has not alleged that the submitted a request to Nationstar, with all
the information necessary to show changed circumstances. His conclusory, barebones

1 allegation that he "had a sharp change in circumstances, in or around the middle of 2016
2 [but] was never afforded a fair opportunity to be evaluated, and . . . was never evaluated,
3 for a foreclosure prevention alternative," FAC ¶ 41, is insufficient to state a claim under
4 § 2923.6(g). As was true with the original complaint, the allegations in the FAC fall well
5 short of pleading a specific change in circumstances, and also fail to plead facts showing
6 when plaintiff advised Nationstar of this purported change and what information he claims
7 to have provided to Nationstar at that time. See, e.g., Ivey v. JP Morgan Chase Bank,
8 N.A., 2016 WL 4502587 at *4 (N.D. Cal. Aug. 29, 2016).

9 In the May 12, 2017 order re the motion to dismiss the original complaint, the court
10 stated, "To the extent plaintiff is attempting to invoke § 2923.6(g), he must allege facts
11 showing a specific change in financial circumstances that was documented and
12 submitted to Nationstar." Order at 2. Plaintiff has not complied with these instructions.
13 Accordingly, the court finds that further leave to amend would be futile. The § 2923.6(g)
14 claim is dismissed with prejudice.

15 2. California Civil Code § 2923.7

16 The second cause of action alleges that Nationstar violated Civil Code § 2923.7,
17 which is also part of the HBOR. Section 2923.7 provides that where a borrower requests
18 a foreclosure prevention alternative, "the mortgage servicer shall promptly establish a
19 single point of contact and provide to the borrower one or more direct means of
20 communication with the single point of contact." Cal. Civ. Code § 2923.7(a). The SPOC
21 may be an individual or a team of personnel, "each of whom has the ability and authority
22 to perform the responsibilities" described in the statute. Cal. Civ. Code § 2923.7(c).

23 The borrower's SPOC is responsible for, among other things, "[c]ommunicating the
24 process by which a borrower may apply for an available foreclosure prevention
25 alternative," "coordinating receipt of all [associated] documents," "notifying the borrower
26 of any missing documents necessary to complete the application," "[h]aving access to
27 current information and personnel sufficient to timely, accurately, and adequately inform
28 the borrower of the current status of the foreclosure prevention alternative," and "[h]aving

1 access to individuals with the ability and authority to stop foreclosure proceedings when
2 necessary.” Cal. Civ. Code § 2923.7(b)(1)-(5).

3 Plaintiff asserts that Nationstar violated § 2923.7 by failing to provide him with an
4 SPOC to accurately and adequately inform him of the current status of the foreclosure
5 prevention alternative and ensure that he was considered for all available loss mitigation
6 options to avoid foreclosure. Plaintiff contends that he was "assigned" to Ms. Karp, but
7 that she failed to perform her duties and was not part of a team who performed such
8 duties. FAC ¶¶ 87.

9 Plaintiff alleges that Ms. Karp did not respond to his requests when he attempted
10 to reach her. FAC ¶¶ 29. He claims that he sent emails to Ms. Karp on December 9,
11 2014, December 18, 2014, and January 7, 2015, without response, although he also
12 alleges that she provided him with a response on January 9, 2015. FAC ¶¶ 30. He
13 asserts that he also spoke to “Faye,” “Monique,” and “Icy” at Nationstar. FAC ¶¶ 34-35.
14 In addition, he was later “able to reach other representatives,” although he claims they
15 provided him with “inconsistent information.” FAC ¶¶ 87.

16 Nationstar argues that this cause of action should be dismissed for failure to state
17 a claim, because while plaintiff alleges that Nationstar failed to assign him an SPOC, he
18 also concedes that Nationstar did assign an SPOC – Ms. Karp – who did at some point
19 contact him, and he also alleges that he spoke to other Nationwide representatives about
20 the status of his application. In addition, Nationstar notes, Exhs. C and N to the original
21 complaint reference plaintiff's contacts with Nationstar (which Nationstar refers to as "loss
22 mitigation reviews").

23 Moreover, Nationstar asserts, as is true with the claim under § 2923.6, even if
24 plaintiff had pled a violation of § 2923.7, he alleges no facts showing a material violation
25 of the HBOR that was not remedied by the July 2016 loan modification review and denial
26 of his loan modification application.

27 In opposition, plaintiff asserts that he has adequately alleged a violation of
28 § 2923.7 by alleging that while Nationstar designated Ms. Karp as his SPOC, she failed

1 to respond to him on many occasions, and then told plaintiff to contact Nationstar
2 customer service directly. In addition, he asserts, he received conflicting information from
3 the representatives he did talk to. He was told by Faye on December 10, 2015, that the
4 application was not denied; but he was told by Icy on January 5, 2015, that the
5 application was denied. Plaintiff contends that a servicer who provides an SPOC who in
6 turn provides incorrect information, or who fails to follow up with a loan modification
7 request, violates § 2923.7.

8 The court finds that the motion to dismiss this cause of action must be GRANTED.
9 Plaintiff has pled no claim against Nationstar for failure to provide an SPOC because as
10 explained above, Nationstar has reviewed and denied plaintiff's application for a loan
11 modification, and no trustee's deed upon sale has been recorded. Under those
12 circumstances, § 2924.12(c) provides that there can be no liability for violation of
13 specified sections of the HBOR, including § 2923.7.

14 Furthermore, a violation of § 2923.7 is actionable only when that violation is
15 material. A material violation is one where "the alleged violation affected a plaintiff's loan
16 obligations or the modification process." Cornejo v. Ocwen Loan Servicing, LLC, 151
17 F.Supp.3d 1102, 1113 (E.D. Cal. 2015). Here, based on the exhibits attached to the
18 original complaint, Nationstar conducted a loss mitigation review, plaintiff's application
19 has been processed, and plaintiff was given an opportunity to appeal the denial. Plaintiff
20 has not explained how the alleged denial of his right to an SPOC in any way affected his
21 loan obligations or the modification process.

22 3. California Business & Professions Code § 17200

23 The third cause of action asserts that Nationstar violated Business & Professions
24 Code § 17200 ("UCL"), which prohibits "any unlawful, unfair, or fraudulent business act or
25 practice." Cal. Bus. & Prof. Code § 17200.

26 In this cause of action, plaintiff alleges, first, that Nationstar engaged in "unlawful"
27 behavior. FAC ¶ 102. He asserts that Nationstar's violations of HBOR "constitute a
28 pattern and practice of unlawful corporate behavior." FAC ¶ 100. He also alleges that

1 Nationstar omitted to disclose "the nature of the charges and fees assessed" on his Loan,
2 FAC ¶ 97-98, and that these "omissions of material facts" constitute "unlawful" business
3 practices because they violate 18 U.S.C. § 1341 (mail fraud), § 1344 (bank fraud), and
4 § 1962 (RICO), as well as California Civil Code § 1572 (actual fraud), § 1573
5 (constructive fraud), § 1709 (deceit/damages), § 1710 (deceit defined), and § 1711
6 (deceit on the public) "to name a few." FAC ¶ 102.

7 Second, plaintiff alleges that Nationstar's violations of HBOR "were against public
8 policy, as the legislature enacted the [HBOR] as an emergency act, to slow the
9 foreclosure process so that foreclosure could be avoided." FAC ¶ 100. He asserts that
10 these "acts and practices" constitute "unfair" business acts under § 17200 because they
11 "offend public policy and are substantially injurious to [p]laintiff and all consumers[;]" and
12 that they insufficiently "outweigh the substantial harm to [p]laintiff, other consumers, and
13 potential homeowners." FAC ¶ 103.

14 In addition, plaintiff alleges that Nationstar engaged in "deceptive business
15 practices with respect to mortgage loan servicing, foreclosing of residential properties
16 and related matters," by committing violations of HBOR; by sending him "false and
17 misleading advertisements" misrepresenting the availability of options to save his home
18 and leading him to believe he could save his home in a matter of days if he just called; by
19 failing to sufficiently train loss mitigation staff and failing to maintain adequate systems for
20 tracking borrower documents; by instituting improper foreclosure proceedings to generate
21 inflated and unwarranted default-related fees; by misrepresenting the foreclosure status
22 of his property; by concealing the true character, quality, and nature of "their" assessment
23 of marked-up fees against his accounts; and by making false representations and false
24 promises designed to deceive him into thinking he was safe from foreclosure and was
25 working with an SPOC when that was not true. FAC ¶ 95.

26 Third, plaintiff asserts that Nationstar engaged in "fraudulent" business acts and
27 practices by concealing material facts, and that "[t]his concealment was made with
28 knowledge of its effect, and was done to induce [p]laintiff to pay the marked-up and/or

1 unnecessary fees for default-related services. FAC ¶ 96. Plaintiff also claims that
2 Nationstar omitted an itemization of all the charges and fees assessed on his Loan, and
3 that it imposed charges and fees that were never incurred. FAC ¶ 97.

4 Nationstar argues that the § 17200 claim should be dismissed for failure to state a
5 claim. As an initial matter, Nationstar contends that plaintiff lacks standing under the
6 UCL, because a § 17200 claim must be brought “by a person who has suffered injury in
7 fact and has lost money or property as a result of the unfair competition,” see Cal. Bus. &
8 Prof. Code § 17204, and plaintiff has not pled facts sufficient to meet that requirement.

9 Under the UCL, a plaintiff must show that her injury came “as a result of” the unfair
10 competition.” Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 326 (2011) (quoting Cal.
11 Bus. & Prof. Code § 17204). The purpose of this provision is “to confine standing to
12 those actually injured by a defendant’s business practices.” Id. 321. To satisfy this
13 standing requirement, a plaintiff must “(1) establish a loss or deprivation of money or
14 property sufficient to qualify as injury-in-fact, i.e., economic injury, and (2) show that the
15 economic injury was the result of, i.e., caused by, the unfair business practice or false
16 advertising that is the gravamen of the claim.” Id. at 322; see also Rubio v. Capital One
17 Bank, 613 F.3d 1195, 1203-04 (9th Cir. 2010).

18 Nationstar asserts that plaintiff has not pled any economic injury, and indeed,
19 admits that he made the last payment on the Loan on July 10, 2009. See FAC ¶ 24.
20 Moreover, Nationstar argues, even if plaintiff had alleged that he lost money or property,
21 he has not pled any nexus between the alleged misconduct and his alleged injury.
22 Indeed, Nationstar asserts, it is clear that any alleged injury was caused by plaintiff’s
23 undisputed failure to make his loan payments for the past eight years.

24 In opposition, plaintiff asserts that both the imposition of marked-up and
25 unnecessary fees and the threat to foreclose are sufficient to establish standing to assert
26 a UCL claim, and he argues that he has thus shown injury-in-fact. Some courts have
27 held that both of these can qualify under certain circumstances as injury-in-fact. See,
28 e.g., Sullivan v. Washington Mut. Bank, FA, 2009 WL 3458300, at *4 (N.D. Cal. Oct. 23,

1 2009); see also Galang v. Wells Fargo Bank, N.A., 2017 WL 1210021 at *6 (N.D. Cal.
2 Apr. 3, 2017); Stokes v. CitiMortgage, Inc., 2014 WL 4359193 at *12 (C.D. Cal. Sept. 3,
3 2014); Ellis v. J.P. Morgan Chase & Co., 950 F.Supp. 2d 1062, 1086 (N.D. Cal. 2013).

4 Here, however, the vague and conclusory allegations in the FAC regarding
5 “marked-up and unnecessary fees for default-related services” – none of which relate to
6 plaintiff or to his Loan – are not sufficient to show that plaintiff lost money or property,
7 particularly given that plaintiff alleges no facts showing that he has paid any fees. Nor
8 has plaintiff pled a single fact showing that unlawful fees have been imposed. While in
9 theory he might be able to allege economic injury based on such fees and charges, see,
10 e.g., Ellis, 950 F.Supp. 2d at 1086, he does not allege he has actually paid any such
11 unlawful fees and charges (indeed, he alleges he has made no payment at all since July
12 2009), nor has he identified any of the fees and charges allegedly assessed to his
13 account or explained why they are excessive or unlawful.

14 As for the alleged threat of foreclosure, any such threat would be a direct result of
15 plaintiff's admitted failure to make his loan payments for the past eight years. See FAC
16 ¶ 24. Where a plaintiff's foreclosure results from his having defaulted on his loan prior to
17 the defendant's allegedly wrongful acts, he cannot state a claim under the UCL. See,
18 e.g., Morgan v. Aurora Loan Servs., LLC, 646 Fed. Appx. 546 (9th Cir. 2016); Jenkins v.
19 JP Morgan Chase Bank, N.A., 216 Cal. App. 4th 497, 523 (2013).

20 In addition, the Notice of Trustee's Sale was recorded on May 26, 2016 (with the
21 sale date set for June 20, 2016), but no sale went forward, and plaintiff does not allege
22 that any further notice of sale has been recorded. Under Civil Code § 2924g, a notice of
23 sale expires after 365 days (regardless of any postponements). Since the notice has
24 expired, foreclosure cannot be “imminent.” Accordingly, the court finds that plaintiff has
25 not established that he has standing under the UCL.

26 Nationstar also contends that the FAC fails to plead facts showing any unlawful,
27 unfair, or fraudulent business act or practice; and furthermore that plaintiff's entire claim
28 sounds in fraud, but he has not alleged fraud with particularity.

1 In opposition, plaintiff contends that the FAC presents a valid claim under each of
2 the three “prongs” of § 17200. He argues that he has presented a valid claim under the
3 "unlawful" prong of the UCL "based on [d]efendants' various violations of the HBOR,
4 discussed above and other violations of the law as stated in the Complaint."

5 Plaintiff asserts that the alleged violations of the HBOR also amount to "unfair"
6 conduct under the UCL. He contends that this "unethical, oppressive, and injurious
7 conduct would substantially injure considers [sic] without any countervailing benefit to
8 considers [sic] or competition." He also claims that the alleged violations constitute
9 "conduct against legislatively stated public policy as the purpose of [the HBOR] is to
10 ensure that 'borrowers are considered for, and have a meaningful opportunity to obtain,
11 available loss mitigation offered by or through the borrower's mortgage servicer'" (citing
12 Cal. Civ. Code § 2923.4(a)).

13 Finally, plaintiff argues that he has pled facts sufficient to support a claim under
14 the "fraudulent" prong. He points to FAC ¶ 95, where he alleges that Nationstar engaged
15 in “deceptive business practices” by engaging in "dual tracking," by recording a false
16 declaration in violation of Civil Code § 2923.55, by failing to review his financial packet
17 despite his material change in circumstances; by recording the Notice of Sale in May
18 2016 prior to providing any result of the appeal of the loan modification denial; by
19 providing an SPOC who was non-responsive; and by charging fees that were
20 unnecessary and unreasonable.

21 The court finds that plaintiff has not alleged facts sufficient to show an "unlawful,"
22 an "unfair," or a "fraudulent" business act or practice, and that the motion to dismiss this
23 cause of action must GRANTED. The "unlawful" prong of the UCL incorporates
24 “violations of other laws and treats them as unlawful practices.” Cel-Tech Comms., Inc.
25 v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999); see also Walker v. Countrywide
26 Home Loans, Inc., 98 Cal. App. 4th 1158, 1169 (2002). To state a claim under the
27 “unlawful” prong of the UCL, a plaintiff may allege the commission of any act “forbidden
28 by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-

1 made.” Saunders v. Sup. Ct., 27 Cal. App. 4th 832, 838-39 (1994).

2 Plaintiff bases his claim under the "unlawful" prong both on the alleged violations
3 of HBOR (as to which he has not stated a claim) and on a laundry list of federal and state
4 statutes (which are not pled as causes of action and as to which he has not alleged facts
5 sufficient to state a claim). Thus, the FAC does not plead the predicate legal violation
6 which is necessary to state a claim under the "unlawful" prong of the UCL.

7 With respect to the “unfair” prong, a business act or practice is “unfair” when the
8 conduct “threatens an incipient violation of an antitrust law, or violates the policy or spirit
9 of one of those laws because its effects are comparable to or the same as a violation of
10 the law, or otherwise significantly threatens or harms competition.” Cel-Tech, 20 Cal. 4th
11 at 187; see also Lueras v. BAC Home Loans Servicing, L.P., 221 Cal. App. 4th 49, 81
12 (2013).

13 Here, to the extent it is even comprehensible, plaintiff's claim regarding "unfair"
14 business practices is premised on vague allegations of the "public policy" that underlies
15 the HBOR. However, he has not connected that public policy to any action taken by
16 Nationstar (apart from the claims that Nationstar violated § 2923.6 and § 2923.7). This
17 portion of the claim also appears to sound in fraud, based on the allegations of
18 "deception," but the FAC fails to state "with reasonable particularity" the facts to support
19 this claim. See Khoury v. Maly's of Cal., Inc., 14 Cal. App. 4th 612, 619 (1993). In
20 addition, to the extent that the "unfair" practices claim sounds in fraud. Rule 9(b) must
21 also be satisfied, which is not the case here. See Kenery v. Wells Fargo, N.A., 2015 WL
22 5138635, at *2 (N.D. Cal. Sept. 1, 2015).

23 As for the “fraudulent” prong, the UCL requires “a showing that members of the
24 public are likely to be deceived” by the allegedly fraudulent practice. Prakashpalan v.
25 Engstrom, Lipscomb and Lack, 223 Cal. App. 4th 1105, 1134 (2014). Additionally,
26 however, claims under the “fraudulent” prong of the UCL must be pled “with particularity”
27 as to “the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b); Kearns v.
28 Ford Motor Co., 567 F.3d 1120, 1125-26 (9th Cir. 2009). The plaintiff must set forth “the

1 time, place, and specific content of the false representations as well as the identities of
2 the parties to the misrepresentation.” Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th
3 Cir. 2007) (internal quotation marks omitted).

4 Here, as with the claim under the "unfair" prong, the alleged "fraudulent" conduct
5 is based either on the purported violations of the HBOR (which claims are not adequately
6 pled, as explained above) or on vague and non-specific claims of "deceit" which are not
7 supported by any particularized facts in the FAC. See, e.g., FAC ¶¶ 95, 116. Plaintiff
8 has not satisfied the Rule 9(b) requirement and consequently, fails to assert a cause of
9 action under the “fraudulent” prong of the UCL.

10 4. Negligence

11 In the fourth cause of action for negligence, plaintiff alleges that Nationstar
12 breached its duty of care to him in the servicing of his Loan. FAC ¶ 116. Plaintiff asserts
13 that Nationstar had a duty to use reasonable care to maintain proper and accurate loan
14 records, and "discharge and fulfill the other incidents attendant to the maintenance,
15 accounting, and servicing of loan records," including keeping an accurate accounting of
16 plaintiff's payments, credits, and debits; disclosing to plaintiff the status of any foreclosure
17 actions taken by defendants; refraining from taking any action against plaintiff that they
18 did not have legal authority to do; providing plaintiff with all relevant information regarding
19 the Loan; and maintaining proper documentation of client status of legal holds and
20 restrictions on communications with clients. See FAC ¶ 110.

21 Plaintiff asserts that Nationstar "stepped outside its normal role as lender and
22 servicer and assumed additional responsibilities and duties when it undertook efforts to
23 engage in loss mitigation review and modify loans," including his Loan. FAC ¶ 111.
24 These "additional responsibilities" allegedly included the "proper implementation of
25 available foreclosure prevention alternatives" and following the duties set forth in the
26 HBOR, with its provisions against dual-tracking, and provisions implementing an SPOC,
27 so that plaintiff would be fairly and properly evaluated for a suitable foreclosure
28 prevention alternative. FAC ¶ 112.

1 Plaintiff alleges further that in taking or in failing to take “the actions alleged
2 above,” defendants breached their duty of care to plaintiff in the servicing of his Loan.
3 See FAC ¶ 116 (listing ways Nationstar allegedly breached its duty of care to plaintiff).
4 The list in FAC ¶ 116 is essentially identical to the list in FAC ¶ 95, describing actions
5 allegedly taken by Nationstar that were "deceptive business practices" for purposes of
6 the UCL claim. In addition, plaintiff asserts that Nationstar breached its duty of skill and
7 care to plaintiff by "refusing to notify plaintiff of his foreclosure prevention alternatives
8 before instituting foreclosure proceedings and recording the Notice of Default and by
9 failing to consider plaintiff for foreclosure prevention alternatives after being informed of
10 plaintiff's material change in financial circumstances." FAC ¶ 117.

11 Plaintiff claims that as a result of "defendants' negligence," he has suffered from
12 "substantial arrearages, which include additional and unnecessary interest and fees," "an
13 adverse effect on his credit score," "the loss of equity in his home," and "being precluded
14 from his rights and protections under the [HBOR]." FAC ¶ 118.

15 The elements of negligence in California are: (1) defendant had a legal duty to use
16 due care towards the plaintiff; (2) the defendant breached that duty; and (3) the breach
17 was the proximate or legal cause of (4) the resulting injury. Ladd v. Cty. of San Mateo,
18 12 Cal. 4th 913, 917-18 (1996). “The existence of a legal duty to use reasonable care in
19 a particular factual situation is a question of law for the court to decide.” Vasquez v.
20 Residential Invs., Inc., 118 Cal. App. 4th 269, 278 (2004).

21 “[A]s a general rule, a financial institution owes no duty of care to a borrower when
22 the institution's involvement in the loan transaction does not exceed the scope of its
23 conventional role as a mere lender of money.” Nymark v. Heart Fed. Sav. & Loan Ass'n,
24 231 Cal.App.3d 1089, 1096 (1991). However, courts sometimes apply the so-called
25 Biakanja factors to determine whether a duty is owed under a narrow exception to the
26 general rule. See, e.g., Alvarez v. BAC Home Loans Servicing, L.P., 228 Cal. App. 4th
27 941, 945-46 (2014). These factors are (1) the extent to which the transaction was
28 intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree

1 of certainty that the plaintiff suffered injury, (4) the closeness of the connection between
2 the defendant's conduct and the injury suffered, (5) the moral blame attached to the
3 defendant's conduct, and (6) the policy of preventing future harm. See Biakanja v. Irving,
4 49 Cal. 2d 657, 650 (1958).

5 Nationstar argues that the negligence cause of action should be dismissed for
6 failure to state a claim. In the May 12, 2017 order, the court dismissed the negligence
7 claim with leave to amend, directing plaintiff to allege facts showing that Nationstar owed
8 him a duty of care, sufficient to show that this alleged duty falls within the narrow
9 exception to the general rule that a financial institution owes no duty of care to a borrower
10 when the institution's involvement in the loan transaction does not exceed the scope of its
11 conventional role as a mere lender of money. Order at 5.

12 Nationstar contends that contrary to this directive, plaintiff's amended negligence
13 cause of action is substantively identical to the negligence claim asserted in the original
14 complaint. See, e.g., Orig. Cplt ¶¶ 140-154; FAC ¶¶ 109-122. Once again, Nationstar
15 argues, plaintiff fails to allege any facts demonstrating that Nationstar breached any duty
16 of care owed to him. And, Nationstar contends, even if the FAC alleged any such duty
17 (which it does not), there are no allegations of breach and/or resulting damages.
18 Nationstar asserts that the allegations discernable from the FAC allege, at most,
19 purported statutory violations which are now moot, because the FAC does not adequately
20 plead claims under those statutes. Nationstar argues that because plaintiff again fails to
21 plead negligence on the part of Nationstar, this cause of action must be dismissed.

22 In opposition, plaintiff argues that the negligence claim is adequately pled. With
23 regard to whether "defendants" owed him a duty, plaintiff asserts that under Alvarez,
24 while a lender may not owe a duty to offer or approve a loan modification, a lender does
25 owe a borrower a duty to exercise reasonable care in the review of the borrower's loan
26 modification applications once the lender agrees to review for a modification. In addition,
27 plaintiff asserts, under Lueras, a lender has a duty not to make material
28 misrepresentations about the status of an application for a loan modification or about the

1 date, time, or status of a foreclosure.

2 Plaintiff contends that he has properly pled a claim of negligence against
3 Nationstar, and that the claim is supported by the allegations in FAC ¶ 116 that
4 Nationstar breached its duty to plaintiff by violating the HBOR, and by various acts of
5 "deception." He contends that the question whether defendants owed him a duty of care
6 in this case is governed by the Biakanja factors, which he lists, but does not discuss or
7 explain how they apply here.

8 Plaintiff reiterates that the proper way to remedy alleged HBOR violations such as
9 those asserted in the FAC (including in the negligence claim) is to rescind the Notice of
10 Default, but that Nationstar has not done that in this case, and so he argues that the
11 HBOR claims are still viable. In addition, plaintiff contends that Nationstar breached its
12 duty to him by informing him that his loan modification was denied, and then that it was
13 conditionally approved, which was not true, "all as set forth in the FAC." This appears to
14 be a reference to the 2009 request to BofA for a loan modification.

15 The court finds that the motion must be GRANTED. Plaintiff fails to state a claim
16 for negligence because he has not alleged any facts demonstrating the existence of a
17 duty, breach, or damage. In amending the complaint, plaintiff has not complied with the
18 court's directive regarding the pleading of the negligence claim. See Order at 5 (citing
19 Nymark, 231 Cal. App. 3d at 1095-96).

20 Instead, plaintiff re-alleges, almost verbatim from the original complaint, that
21 Nationstar had a duty to "exercise reasonable care and skill to maintain proper and
22 accurate loan records," and to "discharge and fulfill the other incidents attendant to the
23 maintenance, accounting and servicing of loan records," including (a) "[k]eeping an
24 accurate accounting of [p]laintiff's mortgage payments, credits, and debits;"
25 (b) "[d]isclosing to [p]laintiff the status of any foreclosure actions taken by [d]efendants;"
26 (c) "[r]efraining from taking any action against [p]laintiff that they [sic] did not have the
27 legal authority to do;" (d) [p]roviding [p]laintiff with all relevant information regarding the
28 Loan;" and (e) "[m]aintaining proper documentation of client status of legal holds and

1 restrictions on communication with clients." See FAC ¶ 110; Orig. Cplt ¶ 141. However,
2 plaintiff pleads no facts showing that Nationstar in fact owed him any of these "duties," or
3 that an exception should be made to the general rule articulated in Nymark.

4 Nor does plaintiff allege facts showing that Nationstar breached any duty of care
5 owed to him, or that he suffered any resulting damages. California courts have differed in
6 their application of the Biakanja factors in the home loan modification context. In Lueras,
7 the court noted that a loan modification is the renegotiation of loan terms, which falls
8 within the scope of a lending institution's conventional role as a lender of money. Id., 221
9 Cal. App. 4th at 67. The court found that the Biankanja factors did not support finding a
10 duty of care because the harm – being unable to make payments on the loan – was a
11 result of the borrower's default on the loan, and was not "closely connected to the
12 lender's conduct" as long as the lender had not placed the borrower in the position that
13 created the need for the loan modification in the first place. Id. Thus, the Lueras court
14 found that the lender had no common law duty under California law "to offer or approve a
15 loan modification." Id.

16 In Alvarez, the court concluded that the lender did have a common law duty to
17 exercise reasonable care in the review of the plaintiffs' loan modification applications
18 once the lender had agreed to consider the applications. Id., 228 Cal. App. 4th at 948-
19 49. The plaintiffs alleged that the lender improperly handled their loan modifications and
20 that the lender's delay in processing the loan modification deprived them of "the
21 opportunity to seek relief elsewhere." Id. at 951. The court found that "[t]he transaction
22 was intended to affect the plaintiffs" and that it was foreseeable that failing to timely and
23 carefully process the loan modification applications could result in significant harm to
24 plaintiffs. Id. The court concluded that the Biankanja factors supported finding a duty of
25 care. Id. at 952.

26 Federal courts disagree as to whether Lueras or Alvarez is more persuasive.
27 Compare Romo v. Wells Fargo Bank, N.A., 2016 WL 324286, at *9 (N.D. Cal. Jan. 27,
28 2016) (stating that "most federal district courts have followed Alvarez"), with Marques v.

1 Wells Fargo Bank, N.A., 2016 WL 5942329, at *7 (N.D. Cal. Oct. 13, 2016) (“A growing
2 number of courts that have addressed this issue since Lueras and Alvarez have adopted
3 the holding in Lueras in finding that a mortgage servicer does not owe borrowers a duty
4 of care in processing a residential loan modification”).

5 The recent trend among federal district courts in California appears to be more in
6 the direction of adopting the position of the Lueras court. See Newman v. Bank of N.Y.
7 Mellon, 2017 WL 1831940, at *11 (E.D. Cal. May 8, 2017) (collecting cases); Shupe v.
8 Nationstar Mrtg. LLC, 213 F.Supp. 3d 597, 604-05 (E.D. Cal. Jan. 31, 2017) (same);
9 Harris v. Wells Fargo Bank, 2016 WL 3410161, at *6 (C.D. Cal. June 15, 2016).

10 In addition, even though it has yet to issue a "reported" decision, the Ninth Circuit
11 also appears to find the Lueras line of cases more persuasive. See Anderson v.
12 Deutsche Bank Nat'l Trust Co. Ams., 649 Fed. Appx. 550, 552 (9th Cir. 2016) (mem.)
13 (citing Lueras, 221 Cal. App. 4th at 68); Badame v. J.P. Morgan Chase Bank, N.A., 641
14 Fed. Appx. 707, 709-10 (9th Cir. 2016) (mem.) quoting Lueras, 221 Cal. App. 4th at 68));
15 Deschaine v. IndyMac Mortg. Servs., 617 Fed. Appx. 690, 693 (9th Cir. 2015) (mem.)
16 (quoting Lueras, 221 Cal. App. 4th at 68).

17 However, the court need not decide whether Lueras or Alvarez is more
18 persuasive. Even assuming that Alvarez is correct that a lender owes a borrower a duty
19 of care in some circumstances, plaintiff has not shown that those circumstances exist
20 here. Regardless of what may or may not have happened while BofA was servicing
21 plaintiff's Loan – during which time plaintiff ceased making payments on the Loan – the
22 allegations in the FAC and the documents attached to the FAC and the original complaint
23 show that plaintiff applied for a loan modification, that the application was denied for
24 reasons clearly articulated by Nationstar, and that no foreclosure has occurred to date .

25 By contrast, the plaintiffs in Alvarez alleged that the lender had failed to review the
26 plaintiffs' loan modification application in a timely manner, foreclosed on the plaintiffs'
27 property while the plaintiffs were still under consideration for a HAMP modification, relied
28 on incorrect information in handling plaintiffs' application, and falsely advised plaintiffs

1 that no documents had been submitted for review. See id., 228 Cal. App. at 945.

2 The allegations discernable from the FAC at most relate to purported statutory
3 (HBOR) violations that are now moot. The FAC pleads no facts plausibly showing that
4 plaintiff's circumstances were similar to those of the plaintiffs in Alvarez – or that
5 Nationstar exceeded “the scope of its conventional role as a mere lender of money” such
6 that it owed plaintiff a duty of care. Given the absence of any facts relating to cognizable
7 conduct on the part of Nationstar which could give rise to plaintiff's claim that Nationstar
8 breached a duty of care to him, the court finds that this claim must be dismissed.

9 5. Negligent Misrepresentation

10 The fifth cause of action for negligent misrepresentation alleges that Nationstar
11 "fraudulently misled" plaintiff to believe that Nationstar was going to work with him to
12 obtain a long-term solution for his Loan or review it for modification, FAC ¶ 124; that
13 plaintiff was "fraudulently misled into believing that a long term solution to keep him in the
14 home was being worked on and a sale date was not, in fact, pending and [he] so relied
15 on the representations from Ms. Karp indicating that she was the [assigned SPOC], FAC
16 ¶ 125; and that plaintiff “reasonably relied” on Nationstar reviewing and responding to the
17 loan modification application, and that he "continued to spend valuable money, time, and
18 efforts in attempting to modify the Loan, which [he] had submitted, only in an effort to
19 obtain a loan modification or other 'resolution' and long-term solution[.]" FAC ¶ 126.

20 Plaintiff asserts that Nationstar representatives "asserted facts that were not true,
21 or concealed true facts, having no reasonable ground for believing them to be true,
22 intending [p]laintiff to rely upon the assertions as to the review of their [sic] loan
23 modification application." FAC ¶ 128. He alleges that Nationstar acted "knowingly and
24 maliciously to form and further the common plan and scheme to defraud [p]laintiff and
25 allow the home to be sold improperly" and that its conduct "constutes fraud, deceit, and
26 false promises made without the intent to perform, and intentional misrepresentation,
27 among other wrongs." FAC ¶¶ 130-131.

28 Nationstar argues that this cause of action must be dismissed for failure to state a

1 claim. The elements of a cause of action for negligent misrepresentation are (1) a
2 misrepresentation, (2) with absence of reasonable grounds for believing the alleged
3 misrepresentation to be true, (3) with the intent to induce another's reliance on the
4 misrepresentation, (4) actual and justifiable reliance, and (5) resulting damage. Bock v.
5 Hansen, 225 Cal. App. 4th 215, 231 (2014). As is true with negligence, liability for
6 negligent misrepresentation rests upon the existence of a legal duty, imposed by
7 contract, statute, or otherwise, owed by the defendant to the injured person. Id. at 228.

8 In addition, in federal court, a claim of negligent misrepresentation must be pled in
9 accordance with the particularity requirements of Rule 9(b). See Neilson v. Union Bank
10 of Cal., N.A., 290 F.Supp. 2d 1101, 1141 (C.D. Cal. 2003). That is, the facts supporting
11 the alleged misrepresentation be pled with specificity, and conclusory allegations are
12 insufficient. Id. (citing Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 540 (9th Cir.
13 1989)).

14 In the order dismissing the original complaint, the court directed that in amending
15 this claim, plaintiff must allege particularized facts showing the "who, what, when, where,
16 and how" of the alleged negligent misrepresentation, and that it was not sufficient for
17 plaintiff, as in the original complaint, to allege that Nationstar "fraudulently misled him"
18 into believing it would work "to obtain a long term solution for [p]laintiff's Loan or at least
19 properly review them [sic] for a loan modification" or that plaintiff had been "fraudulently
20 misled into believing that a long term solution to keep him in his home was being worked
21 out and that a sale date was not, in fact pending." See Order at 6-7.

22 Here, Nationstar argues, in amending this cause of action in the FAC, plaintiff has
23 not corrected the deficiencies of the original complaint – in particular, he has not alleged
24 fraud with particularity and has not identified a duty that was owed to him. Rather, he has
25 simply repeated, almost verbatim, the allegations in the claim that was dismissed by the
26 court for failure to state a claim.

27 In opposition, plaintiff contends that the FAC adequately states a claim of
28 negligent misrepresentation. He asserts that the FAC alleges that Nationstar fraudulently

1 led him to believe that "they" would work with him to obtain a long term solution for his
2 loan, or at least properly review him and the sale was not pending (citing FAC ¶ 125).
3 Plaintiff claims that "[a]s a result" he "continued to spend time money and efforts toward
4 modifying the loan."

5 Plaintiff points to FAC ¶¶ 34-35, where he alleges after receiving the November 6,
6 2015 Notice of Default in the mail, he called Nationstar on December 10, 2015, and
7 talked with "Faye" who told him that "the records" showed that a loan modification
8 application was "submitted" and "under review" – referring to the application submitted to
9 BofA – and that there were no documents showing if it was approved or denied. FAC
10 ¶ 34. Plaintiff asserts that on December 15, 2015, he called Nationstar and spoke to
11 "Monique" who informed him there had been no response from "escalation," and that on
12 January 5, 2016, he called and spoke to "Icy" who advised that the loan modification
13 application had been denied." FAC ¶ 35.

14 Plaintiff claims that these allegations show that he contacted Nationstar between
15 December 10, 2015 to January 5, 2016, as to the status of his loan modification review,
16 but did not receive information or documents showing that it was approved or denied
17 "despite the fact that Nationstar had led [him] to believe there was a long term solution
18 available." He adds that Nationstar made these "representations" without a reasonable
19 ground for believing them to be true under these circumstances, and that Nationstar
20 made "each material misrepresentation" with the intent to induce plaintiff's reliance on
21 "the fact misrepresented," and to deceive plaintiff. He adds that Nationstar owes him a
22 duty under "common law, California statutory laws, and Federal rules and regulations,"
23 but does not elaborate.

24 The court finds that the motion to dismiss this cause of action must be GRANTED.
25 First, the pleading does not satisfy the requirements of Rule 9(b). The FAC includes
26 vague allegations essentially suggesting that Nationstar falsely represented that plaintiff
27 would receive a loan modification, and misled him into believing that it was going to "work
28 with him to obtain a long term solution" for his Loan or "at least properly review for a loan

1 modification.” See FAC ¶ 124. The implication is that he was told he would receive a
2 loan modification, although he pleads no facts to support such a claim. The fact that he
3 requested a loan modification and the fact that he was being evaluated for a loan
4 modification do not translate into an affirmative representation by Nationstar that he
5 would receive a loan modification.

6 Plaintiff also appears to be claiming that his loan modification application was
7 negligently handled by Nationstar. However, he has not alleged facts showing that
8 Nationstar owed him a legal duty of care. It is true that lenders generally “owe a duty to a
9 borrower to not make material misrepresentations about the status of an application for a
10 loan modification or about the date, time, or status of a foreclosure sale.” Lueras, 221
11 Cal. App. 4th at 68. This is distinct, however, from a claim that a modification application
12 was negligently handled or considered. Here, plaintiff has not alleged any facts showing
13 that Nationstar made any negligent misrepresentations of a past or existing material fact.

14 **CONCLUSION**

15 In accordance with the forgoing, the court GRANTS Nationstar’s motion to
16 dismiss. Because the court finds that further amendment would be futile, the dismissal is
17 with prejudice.³

18
19 **IT IS SO ORDERED.**

20 Dated: September 22, 2017



21
22 _____
PHYLLIS J. HAMILTON
United States District Judge

23
24 _____
25 ³ The original complaint named Nationstar and NBS Default Services ("NBS") as
26 defendants. NBS has not responded to the complaint, but Nationstar asserted in the
27 Notice of Removal that NBS had filed a declaration of non-monetary status, that plaintiff
28 had not objected to the declaration, and that NBS "does not expect to participate in this
matter any further." In the May 12, 2017 Order, the court noted that at the May 10, 2017,
hearing, plaintiff’s counsel appeared to agree that plaintiff was not pursuing claims
against NBS. Accordingly, the court finds that NBS should be dismissed from the case.