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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 Timmy Thompson, a single man,  
10 Plaintiff,

No. CV11-0284-PHX-DGC

11 vs.

**ORDER**

12 SunTrust Mortgage, Inc., a corporation;  
13 James Little and Jane Doe Little, his wife;  
14 Ken Meade Realty, an Arizona business  
15 entity; Black Corporation I-X; John Doe I-  
16 X and Jane Doe I-X, their spouses,  
17 Defendants.

17 Defendant Ken Meade Realty, a licensed real estate brokerage, and Defendant  
18 James Little, a licensed real estate salesperson affiliated with Ken Meade Realty  
19 (collectively “KMR”), move to dismiss Plaintiff pro se Timmy Thompson’s complaint  
20 pursuant to Rules 8(a) and 12(b)(6) of the Federal Rules of Civil Procedure. Doc. 8.  
21 Defendant SunTrust Mortgage, Inc. (“SunTrust”) also moves separately to dismiss the  
22 complaint under Rules 8(a) and 12(b)(6). Doc. 7. Plaintiff has responded to each motion  
23 (Docs. 13, 14) and Defendants have filed replies (Docs. 15, 16). The motions are fully  
24 briefed. Docs. 7, 8, 13-16. The Court will grant the KMR motion, grant in part the  
25 SunTrust motion, and remand this case to state court.<sup>1</sup>

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27 <sup>1</sup> Defendants’ request for oral argument is denied because the issues have been  
28 fully briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P.  
78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1     **I.     Background.**

2             This action was commenced in Arizona Superior Court for Maricopa County.  
3     Doc. 1-1 at 6. The case was removed to this Court on the basis of federal-question  
4     jurisdiction as a result of alleged violations of federal law, and supplemental jurisdiction  
5     was asserted over the state law claims. Doc. 1 at 2. Plaintiff did not contest the removal.  
6     The complaint alleges the following facts, and the complaint will be construed liberally in  
7     light of Plaintiff’s pro se status, *see Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir.  
8     2007). In April 2010, Plaintiff hired KMR to arrange for a short sale of the property  
9     owned by Plaintiff and his wife. Doc. 1-1 ¶ 17. The property was subject to a note and  
10    deed of trust in favor of SunTrust. *Id.* at ¶ 8. KMR arranged for a short sale of the  
11    property to a third party, and SunTrust ratified the third party’s purchase offer on  
12    August 6, 2010. *Id.* at ¶ 18. Plaintiff directed KMR to obtain an extension of two weeks  
13    on the short sale closing date in light of his wife’s illness. *Id.* at ¶ 22. Sadly, Plaintiff’s  
14    wife died on August 9, 2010, approximately three weeks prior to the short sale closing  
15    date. *Id.* at ¶ 20. On August 22, 2010, Plaintiff terminated his listing contract with KMR  
16    for cause (*id.* at ¶ 27), and the sale did not close (*id.* at ¶ 28). Plaintiff decided not to sell  
17    the property after his wife’s death, in part because “the property contained many fond  
18    memories of his wife.” *Id.* at ¶ 29.

19             Plaintiff hired a third party and commenced a mortgage modification under the  
20    Home Affordable Mortgage Program (“HAMP”) with SunTrust. Doc. 1-1 ¶ 30. On  
21    September 30, 2010, Plaintiff learned that someone other than him or the modification  
22    company called SunTrust and cancelled the modification stating there was a buyer for the  
23    property and the modification should be stopped. *Id.* at ¶ 31. Plaintiff protested the  
24    cancellation, notified SunTrust that there was no buyer, and indicated that he did not want  
25    to sell the property. *Id.* at 33. SunTrust nonetheless declined to process a modification,  
26    and the property was sold at foreclosure sale on October 18, 2010. *Id.* at ¶¶ 33, 34, 39.  
27    Plaintiff filed this action on January 14, 2010. *Id.* at 6.

1           The complaint asserts five counts: (1) declaratory judgment that the trustee sale  
2 violates HAMP and is therefore void against SunTrust; (2) breach of contract – breach of  
3 the covenant of good faith and fair dealing against SunTrust; (3) breach of contract –  
4 breach of the covenant of good faith and fair dealing against KMR; (4) an injunction  
5 barring SunTrust from evicting Plaintiff; and (5) wrongful foreclosure against SunTrust.  
6 Doc 1-1 at 11-15.

7 **II.    Legal Standard.**

8           When analyzing a complaint for failure to state a claim under Rule 12(b)(6), the  
9 well-pled factual allegations “are taken as true and construed in the light most favorable  
10 to the nonmoving party.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009)  
11 (citation omitted). Legal conclusions couched as factual allegations “are not entitled to  
12 the assumption of truth,” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), and therefore  
13 “are insufficient to defeat a motion to dismiss for failure to state a claim,” *In re Cutera*  
14 *Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010) (citation omitted). To avoid a  
15 Rule 12(b)(6) dismissal, the complaint must plead “enough facts to state a claim to relief  
16 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This  
17 plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than  
18 a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949  
19 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the  
20 court to infer more than the mere possibility of misconduct, the complaint has alleged –  
21 but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at 1950 (quoting Fed.  
22 R. Civ. P. 8(a)(2)).

23           “In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not look*  
24 beyond the complaint to a plaintiff’s moving papers, such as a memorandum in  
25 opposition to a defendant’s motion to dismiss. . . . The focus of any Rule 12(b)(6)  
26 dismissal . . . is the complaint.” *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197  
27 n.1 (9th Cir. 1998) (internal citations omitted; emphasis in original). A court should  
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1 apply less stringent pleading standards to pro se plaintiffs, such that inartful pleadings are  
2 still considered by the court. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Weilburg v.*  
3 *Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007).

### 4 **III. Motion to Dismiss Case by KMR.**

5 KMR moves to dismiss the claims on three grounds: (1) a breach of contract does  
6 not lie in a contract for professional services where a defendant did not breach an express  
7 provision in a contract; (2) the claim for breach of the covenant of good faith and fair  
8 dealing has not been adequately pled; and (3) Plaintiff's breach of fiduciary duty has not  
9 been adequately pled. Doc. 8 at 4-9. KMR also argues that Plaintiff has failed to  
10 establish that he is entitled to punitive damages. *Id.* at 10. In response, Plaintiff argues  
11 that: (1) by alleging a breach of the covenant of good faith and fair dealing he has pled a  
12 tort; (2) his claim has been adequately pled; (3) a jury could conclude KMR breached its  
13 fiduciary duty; and (4) KMR's actions warrant punitive damages. Doc. 13 at 4-6. In  
14 addressing these issues, the Court will discuss only the arguments it found relevant and  
15 grounded in a colorable interpretation of the law.

16 The caption of the third cause of action is entitled "Breach of Contract -- Violation  
17 of Covenant of Good Faith and Fair Dealing -- Claim against LITTLE defendants."  
18 Doc. 1-1 at 13. Under liberal pleading standards afforded to pro se plaintiffs, the caption  
19 can be interpreted as asserting a claim for breach of contract and a claim for violation of  
20 the covenant of good faith and fair dealing. Moreover, the body of the third claim is  
21 consistent with a disjunctive interpretation, and therefore the Court will treat the  
22 complaint as pleading both claims. The Court also finds, however, that Plaintiff's third  
23 cause of action does not plead breach of fiduciary duty as a freestanding claim. Because  
24 a response to a motion to dismiss is not the proper vehicle for alleging new claims, *see*  
25 LRCiv. 15.1, the Court will disregard the unpled claim for breach of fiduciary duty.

#### 26 **A. Breach of the Covenant of Good Faith and Fair Dealing.**

27 Arizona law implies a covenant of good faith and fair dealing in every contract,  
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1 and the “duty arises by virtue of a contractual relationship.” *Rawlings v. Apodaca*, 726  
2 P.2d 565, 569 (Ariz. 1986) (citations omitted). “The essence of that duty is that neither  
3 party will act to impair the right of the other to receive the benefits which flow from their  
4 agreement or contractual relationship.” *Id.*

5 The complaint alleges in part that the contract between Plaintiff and KMR was for  
6 “carrying out the conclusion of a short sale,” and that KMR “did not seek an extension  
7 for the closing time for the short sale, . . . acted outrageously in seeking signatures from  
8 plaintiff’s terminally ill wife while she was in the hospital, and . . . cancel[ed] plaintiff’s  
9 participation in the loan modification under HAMP to enable the short sale to conclude.”  
10 Doc. 1-1 at 14. KMR argues that this claim should be dismissed because Plaintiff has  
11 “not alleged any facts demonstrating how that duty was breached sufficient to put [KMR]  
12 on notice of his claim against them.” Doc. 8 at 8:14-16.<sup>2</sup>

13 The covenant of good faith and fair dealing does not entitle either party to rights  
14 excluded by the contract, “nor to protection in excess of that which is provided for in the  
15 contract[.]” *Rawlings*, 726 P.2d at 571. Plaintiff’s complaint alleges only that the  
16 contract involved “the carrying out of the conclusion of a short sale.” Doc. 1-1 ¶ 55.  
17 Although Plaintiff claims that KMR failed to seek an extension of the short sale, he does  
18 not identify the original closing date or explain how failure to seek an extension of the  
19 date constituted a breach of the contract or the covenant. More importantly, Plaintiff  
20 alleges that he decided not to complete the short sale after his wife’s death. *Id.* at ¶ 29. If  
21 Plaintiff elected not to complete the short sale, it is difficult to understand how KMR’s  
22 failure to extend the date for the short sale caused Plaintiff injury. Moreover, Plaintiff  
23 does not explain how KMR’s alleged attempt to obtain signatures from his wife in the  
24 hospital deprived him of the benefit of the contract.

25 The Court concludes that Plaintiff has not alleged sufficient facts to plead a claim

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27 <sup>2</sup> KMR also argues that it did not breach the covenant (*id.* at 8:17-18), but to the  
28 extent KMR disputes the factual allegations in the complaint, such factual disputes are  
not a proper basis for a Rule 12(b)(6) dismissal. *Cousins*, 568 F.3d at 1067.

1 for breach of the covenant of good faith and fair dealing against KMR. This claim will  
2 therefore be dismissed.<sup>3</sup>

3 **B. Breach of Contract.**

4 The complaint alleges in part that the contract was for “carrying out the conclusion  
5 of a short sale,” and that KMR “did not seek an extension for the closing time for the  
6 short sale, . . . acted outrageously in seeking signatures from plaintiff’s terminally ill wife  
7 while she was in the hospital, and . . . cancel[ed] plaintiff’s participation in the loan  
8 modification under HAMP to enable the short sale to conclude.” Doc. 1-1 at 14.  
9 Although these allegations are insufficient for a breach of the covenant of good faith, the  
10 question remains whether they adequately allege a claim for breach of contract.

11 The Arizona law on contracts between professionals and their clients states that an  
12 action can sound in contract only if there is a breach of a specific promise in the contract.  
13 *Collins v. Miller & Miller, Ltd.*, 943 P.2d 747, 755 (Ariz. Ct. App. 1996). In *Collins*, the  
14 court held that breach of a professional contract “cannot be maintained if the contract  
15 merely requires generally that the professional render services. Only if there is a specific  
16 promise contained in the contract can the action sound in contract, and then only to the  
17 extent the claim is premised on the nonperformance of that promise.” *Collins*, 943 P.2d  
18 at 755. Plaintiff does not appear to dispute that the contract in this case was for  
19 professional services.

20 Plaintiff’s complaint fails to allege any specific provision in the contract that was  
21 breached. The breach of contract claim therefore will be dismissed.

22 **C. Remaining Issues.**

23 Given that Plaintiff’s claims against KMR have been dismissed, his request for  
24 punitive damages must also be dismissed. *See Saucedo v. Sinaloa*, 24 P.3d 1274, 1277 ¶  
25 11 (Ariz. Ct. App. 2001).

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28 <sup>3</sup> In light of the above, the Court has no need to address the issue of whether  
Plaintiff’s alleged breach of the covenant sounds in tort or in contract.

1 Plaintiff requests leave to amend. Doc. 13 at 1. Because the Court is remanding  
2 this case, the Court will leave it to the state court to address Plaintiff's request for leave to  
3 amend. The Court notes, for the benefit of this pro se Plaintiff, that a motion for leave to  
4 amend under Rule 15 of the Arizona Rules of Civil Procedure may need to be filed once  
5 this case is returned to state court.

6 KMR requests attorney fees under Rule 11, A.R.S. § 12-341.01, and  
7 A.R.S. § 12-349. Doc. 8 at 10-11. Because the claims against KMR have not been  
8 dismissed with prejudice, the Court cannot conclude that KMR is entitled to fees under  
9 any of these provisions and will therefore deny the request without prejudice.

#### 10 **IV. Motion to Dismiss by SunTrust.**

11 SunTrust moves to dismiss the claims against it on five grounds: (1) all claims  
12 raised against SunTrust are related to the property and are therefore barred pursuant to  
13 A.R.S. § 33-811(C); (2) any action emanating from the Emergency Economic  
14 Stabilization Act of 2008 ("EESA"), 12 U.S.C. § 5201 *et seq.*, must fail as a matter of  
15 law because no private cause of action exists under those statutes; (3) the claim for  
16 breach of the covenant of good faith and fair dealing has not been adequately pled; (4) the  
17 wrongful foreclosure claim has not been adequately pled, and (5) Arizona does not  
18 recognize a cause of action for wrongful foreclosure. Doc. 7 at 4-12. In response,  
19 Plaintiff argues that: (1) he needs no private right of action under HAMP to sue because  
20 he has stated a cause of action under the original note and deed of trust as modified by  
21 Congress; (2) § 33-811(C) is not applicable because it is preempted by federal law;  
22 (3) the contracts involved in the breach of covenant claim are the original note and deed  
23 of trust, and the alleged contract between Plaintiff and SunTrust which required SunTrust  
24 to offer Plaintiff mortgage modification consideration; and (4) Arizona has recognized a  
25 claim for wrongful foreclosure. Doc. 14 at 4-9.

#### 26 **A. Discussion of EESA-related Arguments.**

27 Claims 1, 2, and 4 of the complaint appear to allege in part a violation of HAMP.  
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1 See Doc. 1-1 ¶ 45 (stating under Claim 1: “The sale was held in violation of federal law,  
2 specifically HAMP because the property had been referred to foreclosure sale while  
3 plaintiff was in that program all in violation of Department of Treasury, Supplemental  
4 Directive, 10-04 (May 11, 2010)[.]”); ¶ 50 (stating under Claim 2: “The commencement  
5 of this foreclosure and forfeiture process while plaintiff was under consideration for  
6 mortgage modification was and is a violation of TARP, HAMP, and the covenant of good  
7 faith and fair dealing[.]”); ¶ 62 (stating under Claim 4: “By reason of the above breaches  
8 of both the mortgage contract and modification contract, and the failure to follow state  
9 law and HAMP, the trustee’s sale as held, materially injured plaintiff with the loss of his  
10 property.”).

11 SunTrust argues that Plaintiff’s claims emanate from alleged violation of the  
12 EESA, and as such should be dismissed because no private right of action exists under  
13 the EESA or its HAMP and TARP programs. Doc. 7 at 5:17-21. Plaintiff does not  
14 contest this assertion, and district courts in Arizona have held that no private right of  
15 action exists under HAMP. *E.g.*, *Marks v. Bank of Am. N.A.*, No. 03:10-CV-08039-PHX-  
16 JAT, 2010 WL 2572988, at \*6-7 (D. Ariz. June 22, 2010); *Puzz v. Chase Home Fin.,*  
17 *LLC*, 763 F. Supp. 2d 1116, 1123 (D. Ariz. 2011); *Schwartz v. Chase Home Fin., LLC*,  
18 CV 10-2120-PHX-FJM, 2010 WL 5151326, at \*1 (D. Ariz. Dec. 13, 2010); *Sheriff v.*  
19 *Deutsche Bank Nat. Trust Co.*, CV-10-1328-PHX-JAT, 2011 WL 1496152, at \*3 (D.  
20 Ariz. Apr. 20, 2011). Accordingly, to the extent the complaint attempts to assert a  
21 violation of the EESA, such claims will be dismissed.

22 Plaintiff also argues that regardless of whether violations of the EESA can serve as  
23 a basis for a civil claim, he has asserted a cause of action under the original note and deed  
24 of trust and Congress has amended them by passing the EESA. Doc. 14 at 4. Plaintiff  
25 does not appear to argue that the text of the note and deed of trust was actually amended,  
26 but rather that Congress implied new terms in them requiring in part that lenders consider  
27 borrowers for a modification and suspend foreclosure while borrowers are being  
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1 considered. *See id.* at 5. Plaintiff does not identify the means by which Congress can  
2 amend a contract between private parties. In addition, although Plaintiff quotes from the  
3 HAMP Guidelines published by the United States Department of Treasury, the quoted  
4 language does not support an inference that Congress intended to amend the note and  
5 deed of trust by passing the EESA. At most, the quoted language states what lenders  
6 should do under the HAMP program. But this does not equate to the implying of a term  
7 in a private contract. Plaintiff offers no other statute or case law that supports his  
8 argument, and the cases he does cite are to no avail. The Court must therefore dismiss  
9 the claims for breach of the EESA-implied terms in the note and deed of trust.

10 **B. Alleged Violations of Federal Contract.**

11 In addition to alleging that he has a right to sue under the original deed and trust as  
12 modified by HAMP, Plaintiff also appears to allege that SunTrust breached its contract  
13 with the federal government by failing to afford Plaintiff consideration for a mortgage  
14 modification. Paragraph 13 of the complaint alleges that SunTrust “either accepted  
15 TARP monies, or otherwise contracted with the federal government to become a  
16 mortgage lender obliged to afford mortgage borrowers such as plaintiff the right to apply  
17 for mortgage aid under HARP and HAMP.” Doc. 1-1 ¶ 13. Claim 5 incorporates “[t]he  
18 matters set forth in the first, second, and fourth claims for relief,” and maintains that  
19 “[t]he foreclosure and forfeiture of plaintiffs’ property was and is wrongful by reason of  
20 the above.” Doc. 1-1 ¶¶ 65, 66. Plaintiff does not clearly state his basis for believing he  
21 has standing to sue for breach of a contract between other parties. Although not alleged  
22 in the complaint, Plaintiff asserts in a footnote of his response that “it is . . . likely that  
23 plaintiff is a third-party beneficiary under HAMP.” Doc. 14 at 5 n.1.

24 Plaintiff clearly cannot assert a claim for breach of SunTrust’s contract with the  
25 federal government. Plaintiff is not a party to the contract. Moreover, Plaintiff cannot be  
26 a third-party beneficiary. In order for Plaintiff to recover as a third party beneficiary, the  
27 contract must reflect that the parties to the contract “intended to recognize him as the  
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1 primary party in interest and as privy to the promise.” *Sherman v. First Am. Title Ins.*  
2 *Co.*, 38 P.3d 1229, 1232 (Ariz. Ct. App. 2002) (citation omitted; emphasis in original).  
3 “Not only must the benefit be intentional and direct, but the third person must be a real  
4 promisee.” *Stratton v. Inspiration Consolidated Copper Co.*, 683 P.2d 327, 329 (Ariz.  
5 Ct. App. 1984). Clearly, any contract between the federal government and SunTrust to  
6 provide federal funds to SunTrust does not recognize Timmy Thompson as the primary  
7 beneficiary of the contract. As a result, Plaintiff cannot state this claim for breach of  
8 contract.<sup>4</sup>

#### 9 **IV. Remand.**

10 Plaintiff’s federal law claims have been dismissed. With the elimination of the  
11 federal claims, the basis for this Court’s jurisdiction no longer exists. *See* Doc. 1. Under  
12 the relevant statute, 28 U.S.C. § 1367(c)(3), the Court may decline to exercise  
13 supplemental jurisdiction over the remaining state claims. The Supreme Court has  
14 instructed that “in the usual case in which all federal-law claims are eliminated before  
15 trial, the balance of factors . . . will point toward declining to exercise jurisdiction over  
16 the remaining state-law claims.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7  
17 (1988) (citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966)).

18 The Court concludes that this action should be remanded. Only state law claims  
19 remain. Resolution of those claims will require application of Arizona law. Arizona  
20 state courts have a greater interest and expertise in resolving state law claims and  
21 applying state court decisions. Additionally, remand will benefit the federal system by  
22 allowing this Court to devote its scarce resources to resolving federal issues.

23 Because the Court is remanding this case to state court, it will not address the  
24 remaining arguments made in SunTrust’s motion to dismiss, but instead will leave those  
25 arguments to be decided by the state court.

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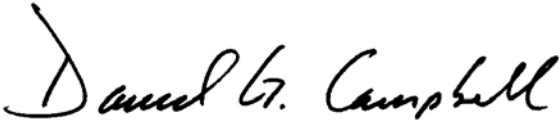
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28 <sup>4</sup> In light of the Court’s ruling on this claim, it need not address the issue of  
whether Plaintiff’s claims are waived pursuant to A.R.S. § 33-811(C).

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**IT IS ORDERED:**

- 1. Defendant SunTrust’s motion to dismiss (Doc. 7) is **granted in part**.
- 2. KMR Defendants’ motion to dismiss (Doc. 8) is **granted**.
- 3. This case is remanded to Maricopa County Superior Court.

Dated this 2nd day of August, 2011.



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David G. Campbell  
United States District Judge