

1 Registration Systems, Inc., a beneficiary for American Brokers Conduit. (*Id.*, ¶ 17)

2 He asserts that on March 26, 2012, “Bank of America, an alleged valid successor loan servicer,
3 notified the plaintiff his loan servicing was transferred” to Resurgent Mortgage, which is a division of
4 Resurgent Capital. (Doc. 21 at 5, ¶ 19) Plaintiff reports a month later, Resurgent Mortgage notified
5 Plaintiff his loan servicing was placed with the company by Freddie Mac, not Bank of America. (*Id.*)
6 Shellpoint began serving Plaintiff’s loan on March 1, 2014, when Resurgent Mortgage became a part of
7 Shellpoint. (FAC ¶ 47; Doc. 2-2 at 24)

8 According to Plaintiff, he sent “his first request for modification or short sale and submitted a
9 hardship letter” to Resurgent Mortgage on January 15, 2013. (Doc. 21 at 5, ¶ 20) He alleges he did not
10 receive a response from Resurgent Mortgage until he filed a complaint, at which time “Resurgent
11 Mortgage then provided Plaintiff with a Uniform Borrowers Assistance Form (UBAF) and written
12 instructions for completion of the application and a list of required documents for loan modification
13 approval.” (*Id.*) He reports the document and instructions were received on April 19, and he
14 “completed and submitted [the] UBAF [on] April 24, 2013. (*Id.*)

15 He alleges that he submitted three UBAs “to defendant Shellpoint’s appointed Single Point of
16 Contact (‘SPOC’); UBAF #1 on December 31, 2014 to SPOC Williams; UBAF #3 on March 24, 2015
17 to SPOC Sanford; and UBAF #3 to SPOC Sanford.”¹ (Doc. 33 at 6, ¶ 18) According to Plaintiff, he
18 submitted “[e]ach and every document on defendant Shellpoint’s original document request letters and
19 UBAF loan modification applications.” (*Id.*) In addition, Plaintiff asserts all of the forms “were
20 submitted in the same manner,” and “were copied in their entirety, indexed, with each and every
21 document certified in writing by a 3rd party as to its submission, double enveloped, and addressed
22 specifically and solely to defendant Shellpoint’s designated single point of contact.” (*Id.*) Plaintiff
23 contends he took “[t]hese precautions ... because of defendant Shellpoint’s repeated document history
24 of losing or mishandling multiple critical ... personal and business identification documents.” (*Id.*)

25 On January 13, 2015, Shellpoint denied the UBAF dated December 31, 2014, stating Plaintiff
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27 ¹ Previously, Plaintiff alleged that he submitted six UBAs between April 2013 and May 2015. (Doc. 21 at 5, ¶21)
28 It appears he omitted reference to the earlier UBAs because they were submitted outside of the statute of limitations
period.

1 did not provide all documents requested, and notifying him additional documents were needed. (Doc.
2 33 at 6, ¶ 21) However, Plaintiff contends Shellpoint “did not identify the specific documents they
3 claimed were missing.” (*Id.*) Plaintiff reports that he “filed an immediate appeal [on] January 24,
4 2015.” (*Id.*, ¶ 22) According to Plaintiff, Shellpoint responded to the appeal, on February 4, 2015,
5 and identified the missing documents. (*Id.*, ¶ 24) He asserts Shellpoint also responded on February
6 15, 2015, and directed the documents be submitted to a different individual. (*Id.*) Plaintiff contends
7 he was unable to respond “until the conditions were clarified and the proper SPOC was identified by
8 Shellpoint.” (*Id.*)

9 Plaintiff alleges he “submitted a new loan modification application” on March 24, 2015, “as
10 instructed by Shellpoint, which was denied in two letters, one dated March 30, 2015 and the
11 12 other dated March 31, 2015.” (Doc. 33 at 8, ¶ 28) Plaintiff asserts the two letters identified
12 “differing missing documents were missing from his again instruct[ed] the plaintiff to submit these
13 alleged different conditions to two different Shellpoint SPOCs.” (*Id.*) Plaintiff contends he was again
14 “unable to [comply] until Shellpoint identified the exact required alleged missing documentation and
15 the identity of their authorized SPOC to review them.” (*Id.*)

16 He asserts he submitted another UBAF “signed May 22, 2015, which was confirmed received
17 by Shellpoint June 1, 2015.” (Doc. 33 at 8, ¶ 28) According to Plaintiff, “Shellpoint’s letter, dated
18 July 7, 2015, ... confirmed that Shellpoint had lost submitted, 3rd party verified documents, and it also
19 contained unreasonable loan modification approval conditions which were impossible for the plaintiff
20 to meet because they were against Generally Accepted Accounting Principles... and IRS Regulations
21 for his sole proprietor business.” (*Id.*, ¶ 29) Plaintiff contends he was unable to comply with the
22 deadlines identified by Shellpoint to submit identified missing documents due to a delay in the mail,
23 and the UBAF from May 2015 was also denied. (*Id.* at 8-9, ¶¶ 31-32)

24 Plaintiff alleges he sent a written request to Shellpoint on October 13, 2015, asking for “a
25 personal meeting with Shellpoint at any office not under control of Shell point escalations supervisor
26 Hayes Jr. to resolve all issues.” (Doc. 33 at 10, ¶ 34) According to Plaintiff, the refusal of Resurgent
27 Mortgage and Shellpoint “to answer these and other vital QWRs questions under RESPA in a timely
28 manner and format required by RESPA led to the unjust, unwarranted, and illegal denial of the

1 plaintiffs six complete UBAFs and was a major factor in the resultant foreclosure of his ... on April
2 25, 2016.” (Doc. 21 at 8-9, ¶ 35)

3 In the First Amended Complaint filed on August 14, 2017, Plaintiff identified the following
4 causes of action: (1) failure to respond to Qualified Written Requests in violation of the Real Estate
5 Settlement Procedures Act, 12 U.S.C. § 2605; (2) violations of the Fair Debt Collection Practices Act,
6 15 U.S.C. § 1692; (3) violations of the Consumer Financial Protection Bureaus Loss Mitigation Laws,
7 Regulations, and Procedures, 12 C.F.R. §1024.41; (4) violations of the Fair Credit Reporting Act, 15
8 U.S.C. § 1685; and (5) violation of the confidentiality of financial records and privacy under 12 U.S.C.
9 § 3403 and 12 C.F.R. 1016. (See Doc. 21 at 6-29) Defendant challenged several causes of action
10 through a motion to dismiss, which was granted by the Court on October 12, 2017. (Docs. 24, 30)

11 On November 14, 2017, Plaintiff filed his Second Amended Complaint. (Doc. 33) In the
12 amended pleading, Plaintiff alleged the following causes of action: (1) violations of the Consumer
13 Financial Protection Bureaus Loss Mitigation Laws, Regulations, and Procedures, 12 C.F.R. §1024.41;
14 and California Foreclosure Reduction Act of 2013, Cal. Civ. Code § 2923.7; (2) violation of The
15 Privacy Act, 12 U.S.C. § 3403; (3) breach of a fiduciary duty; (4) breach of the covenant of good faith
16 and fair dealing; and (5) fraud. (See Doc. 33 at 1, 11-19) Defendants now seek dismissal of the first,
17 third, fourth and fifth claims. (Doc. 35)

18 **II. Pleading Requirements**

19 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A
20 complaint must include a statement affirming the court’s jurisdiction, “a short and plain statement of
21 the claim showing the pleader is entitled to relief; and . . . a demand for the relief sought, which may
22 include relief in the alternative or different types of relief.” Fed. R. Civ. P. 8(a). The Federal Rules
23 adopt a flexible pleading policy, and *pro se* pleadings are held to “less stringent standards” than those
24 drafted by attorneys. *Haines v. Kerner*, 404 U.S. 519, 521-21 (1972).

25 A complaint must state the elements of the plaintiff’s claim in a plain and succinct manner.
26 *Jones v. Cmty Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984). The purpose is to give the
27 defendant fair notice of the claims against him, and the grounds upon which the complaint stands.
28 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). The Supreme Court noted,

1 Rule 8 does not require detailed factual allegations, but it demands more than an
2 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers
3 labels and conclusions or a formulaic recitation of the elements of a cause of action will
4 not do. Nor does a complaint suffice if it tenders naked assertions devoid of further
5 factual enhancement.

6 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

7 **III. Motions to Dismiss**

8 Defendants assert that Plaintiff “fails to state a claim upon which relief may be granted” in his
9 First Amended Complaint, and seeks dismissal of the claims pursuant to Rule 12(b)(6). (Doc. 34 at 2)
10 A Rule 12(b)(6) motion “tests the legal sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732
11 (9th Cir. 2001). Dismissal under Rule 12(b)(6) is appropriate when “the complaint lacks a cognizable
12 legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp.*
13 *Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). Thus, under Rule 12(b)(6), “review is limited to the
14 complaint alone.” *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993). “To survive a
15 motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
16 to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550
17 U.S. 544, 570 (2007)). The Supreme Court explained,

18 A claim has facial plausibility when the plaintiff pleads factual content that allows the
19 court to draw the reasonable inference that the defendant is liable for the misconduct
20 alleged. The plausibility standard is not akin to a “probability requirement,” but it
21 asks for more than a sheer possibility that a defendant has acted unlawfully. Where a
22 complaint pleads facts that are “merely consistent with” a defendant’s liability, it
23 “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

24 *Iqbal*, 556 U.S. at 678 (internal citations, quotation marks omitted).

25 A court must construe the pleading in the light most favorable to the plaintiff, and resolve all
26 doubts in favor of the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). “The issue is not
27 whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to
28 support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and
29 unlikely but that is not the test.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Therefore, the Court
30 “will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead
31 sufficiently all required elements of a cause of action.” *Student Loan Marketing Assoc. v. Hanes*, 181
32 F.R.D. 629, 634 (S.D. Cal. 1998).

1 **IV. Discussion and Analysis**

2 Defendants contend the first, third, fourth, and fifth causes of action raised in the Second
3 Amended Complaint should be dismissed. (Doc. 34 at 5-11) Plaintiff opposes the motion to dismiss,
4 arguing these claims are supported by the factual allegations. (*See generally* Doc. 38)

5 **A. First Claim for Relief, Part I: Violations of the Consumer Financial Protection**
6 **Bureaus Loss Mitigation Laws, Regulations, and Procedures, 12 C.F.R. §1024.41**

7 Plaintiff contends Shellpoint is liable for violating 12 C.F.R. § 1024.41(b)(2)(i)(A)(B)(ii). (*See*
8 *generally* Doc. 33 at 11-12), which may be enforced through the Real Estate Settlement Procedures Act
9 (“RESPA”), 12 U.S.C. § 2605(f). Section 1024.41 sets forth the procedures lenders must follow when
10 reviewing borrowers’ loss mitigation applications, with the obligations differing where the submitted
11 application was complete or incomplete. As a threshold matter, the allegations in Plaintiff’s Second
12 Amended Complaint are again unclear as to whether the initial—or subsequent—loan modification
13 applications that he submitted were complete.² Consequently, the Court is unable to determine which
14 obligations arose under Section 1024.41.

15 Moreover, while Plaintiff identifies the subsection of Section 1204.41 related to the receipt of
16 loss mitigation applications, Plaintiff fails to specifically identify facts addressing the obligations of a
17 servicer and how Shellpoint failed in these obligations. Nevertheless, from what the Court can surmise,
18 Plaintiff contends Shellpoint failed to respond to his loss mitigation applications within the five days
19 required by Section 1204.41, and instead took additional time to inform him whether the loss mitigation
20 applications were complete, what additional documents were required, and to set a deadline that
21 Plaintiff believed was reasonable for him to submit the additional documents.

22 Assuming the facts support a conclusion that the defendant violated these provisions, a servicer
23 may only be liable for (1) “any actual damages” the borrower suffered as a result of the servicer’s
24 failure to comply with its duties, and (2) “any additional damages, as the court may allow, in the case
25 of a pattern or practice of noncompliance with the requirements of this section, in an amount not to

26 ² Plaintiff previously asserts he submitted “five fully completed UBAFs,” (Doc. 21 at 21, ¶ 85) He now has
27 changed the number to three UBAFs, and it is unclear whether the forms were complete as he also alleges Shellpoint
28 responded that documents were missing. At hearing, the plaintiff admitted that Shellpoint indicated that the application
was facially complete but then later required additional documents to be submitted or resubmitted.

1 exceed \$ 2,000.” 12 U.S.C. §2605(f). “Although this section does not explicitly set this out as a
2 pleading standard, a number of courts have read the statute as requiring a showing of pecuniary
3 damages in order to state a claim.” *Allen v. United Financial Mortg. Corp.*, 660 F. Supp. 2d 1089,
4 1097 (N.D. Cal. 2009); (citing *Hutchinson v. Del. Sav. Bank FSB*, 410 F. Supp. 2d 374, 383 (D.N.J.
5 2006) [“alleging a breach of RESPA duties alone does not state a claim under RESPA. Plaintiff must,
6 at a minimum, also allege that the breach resulted in actual damages”]); *see also Pok v. American*
7 *Home Mortg. Servicing, Inc.*, 2010 WL 476674 at *5 (E.D. Cal. Feb. 3, 2010) (dismissing a RESPA
8 claim based on the plaintiff’s failure to allege any facts supporting a conclusion that the defendant’s
9 alleged violation resulted in pecuniary damages).

10 Plaintiff fails to allege actual damages as a result of the alleged RESPA violations, and the facts
11 alleged are insufficient to support a conclusion that Shellpoint has “a pattern or practice of
12 noncompliance with the requirements of [RESPA].” Consequently, Plaintiff’s first claim for relief is
13 not cognizable, to the extent it is based upon a breach of the requirements set forth in Section 1204.41,
14 and is **DISMISSED** with leave to amend.

15 **B. First Claim for Relief, Part II: Violations of Cal. Civ. Code § 2923.7**

16 Plaintiff asserts Shellpoint is liable for violations of Section 2923.7 (Doc. 33 at 11-12), which
17 governs the actions of a single point of contact for a mortgage servicer (“SPOC), which may include an
18 “individual or team of personnel” assigned to a borrower’s account. Cal Civ. Section 2923.7(e).

19 Pursuant to Section 2923.7(b):

20 The single point of contact shall be responsible for doing all of the following:

21 (1) Communicating the process by which a borrower may apply for an available
22 foreclosure prevention alternative and the deadline for any required submissions to be
23 considered for these options.

23 (2) Coordinating receipt of all documents associated with available foreclosure
24 prevention alternatives and notifying the borrower of any missing documents necessary
25 to complete the application.

25 (3) Having access to current information and personnel sufficient to timely,
26 accurately, and adequately inform the borrower of the current status of the foreclosure
27 prevention alternative.

27 (4) Ensuring that a borrower is considered for all foreclosure prevention
28 alternatives offered by, or through, the mortgage servicer, if any.

1 (5) Having access to individuals with the ability and authority to stop
2 foreclosure proceedings when necessary.

3 In addition, the SPOC is to “remain assigned to the borrower’s account until the mortgage servicer
4 determines that all loss mitigation options offered by, or through, the mortgage servicer have been
5 exhausted or the borrower’s account becomes current.” Cal. Civ. Code § 2923.7(c). The SPOC should
6 also “refer[] and transfer[] a borrower to an appropriate supervisor upon the request of a borrower.” *Id.*,
7 § 2923.7(d). The SPOC requirement helps prevent borrowers from being “given the run-around [and]
8 being told one thing by one bank employee while something entirely different is being pursued by
9 another.” *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872, 904-05 (2013).

10 As an initial matter, Plaintiff fails to allege that he requested a SPOC to facilitate the review of
11 his loan modification applications, which is a threshold requirement for a claim for a violation of this
12 provision. See Cal. Civ. Code § 2923.7(a) (“[u]pon request from a borrower who requests a
13 foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of
14 contact”) (emphasis added). See also *Williams v. Wells Fargo Bank, N.A.*, 2014 WL 1568857 at *8
15 (C.D. Cal. Jan. 27, 2014) (“the text of section 2923.7 requires that the borrower make a specific request
16 for a single point of contact”). Moreover, even if Plaintiff had alleged that he had requested an SPOC,
17 Plaintiff’s allegations are insufficient to determine how or why he believes Shellpoint violated Section
18 2923.7. Instead, Plaintiff merely identifies Cal. Civ. Code § 2923.7 subsections (b), (c), (d), and (e) in
19 the caption, and the Court cannot speculate how Shellpoint may be liable for violating these provisions.
20 See *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) (“conclusory allegations of
21 law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a
22 claim”); see also *Norris v. Bayview Loan Servicing, LLC*, 2015 WL 6745048 at *5 (C.D. Cal. Oct. 26,
23 2015) (explaining that the plaintiff’s invocation of Section 2923.7 as a claim, “without further factual
24 support, is a conclusory allegation of law insufficient to defeat a motion to dismiss”). Therefore,
25 Plaintiff’s first cause of action, to the extent it is based upon a violation of Section 2923.7 is not
26 cognizable and is **DISMISSED**.

27 **C. Third Claim for Relief: Breach of a Fiduciary Duty**

28 Defendants contend that “Plaintiff cannot state a claim for breach of fiduciary duty against

1 Shellpoint or Freddie Mac.” (Doc. 34 at 7) To state a claim for breach of fiduciary duty, a plaintiff
2 must show: (1) the existence of a fiduciary relationship; (2) the breach of that relationship; and (3)
3 damage proximately caused by the breach. *Roberts v. Lomanto*, 112 Cal. App. 4th 1553, 1562 (2003).
4 However, “[a]bsent special circumstances . . . a loan transaction is [an] at arms-length [transaction] and
5 there is no fiduciary relationship between the borrower and lender.” *Oaks Mgmt. Corp. v. Superior*
6 *Court*, 145 Cal. App. 4th 453, 466 (2006).

7 As Defendants observe, “The relationship between a lending institution and its borrower-client
8 is not fiduciary in nature.” (Doc. 34 at 7, quoting *Nymark v. Heart Fed. Savings & Loan Assoc.*, 231
9 Cal.App.3d 1089, 1093, fn. 1 (1991). To the contrary, “[a] commercial lender is entitled to pursue its
10 economic interest in a loan transaction. This right is inconsistent with the obligations of a fiduciary,
11 which require that the fiduciary knowingly agree to subordinate its interests to act on behalf of and for
12 the benefit of another.” *Gonzalez v. First Franklin Loan Servs.*, 2010 WL 144862 at *13 (E.D. Cal.
13 Jan. 11, 2010). Further, “a financial institution owes no duty of care to a borrower when the
14 institution’s involvement in the loan transaction does not exceed the scope of its conventional role.”
15 *Nymark.*, 231 Cal.App.3d at 1096.

16 In this case, Plaintiff fails to allege any facts supporting the conclusions that Defendants
17 acted in a manner exceeding their conventional roles as financial institutions, or that Defendants
18 established a fiduciary relationship with Plaintiff. Consequently, Plaintiff’s third claim for a breach of
19 a fiduciary duty fails and is **DISMISSED** with leave to amend.

20 **D. Fourth Claim for Relief: Breach of the Covenant of Good Faith and Fair Dealing**

21 Plaintiff alleges defendants Freddie Mac and Shellpoint are liable for a breach of the covenant
22 of good faith and fair dealing. (Doc. 33 at 17-18, ¶¶ 65-69) Defendants contend this claim fails because
23 Plaintiff’s “allegations are legally insufficient.” (Doc. 34 at 8)

24 Under California law, “there is an implied covenant of good faith and fair dealing in every
25 contract that neither party will do anything which will injure the right of the other to receive the
26 benefits of the agreement.” *Kransco v. American Empire Surplus Lines Ins. Co.*, 23 Cal.4th 390, 400
27 (2000); *see also McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 799 (2008) (“[g]enerally,
28 every contract, . . . imposes upon each party a duty of good faith and fair dealing in its performance and

1 its enforcement”). The covenant is “read into contracts in order to protect the express covenants or
2 promises of the contract, not to protect some general public policy interest not directly tied to the
3 contract’s purpose.” *Carma Developers (Cal.), Inc. v. Marathon Development Cal., Inc.*, 2 Cal.4th 342,
4 373 (1992). Therefore, the implied covenant “cannot impose substantive duties or limits on the
5 contracting parties beyond those incorporated in the specific terms of [the parties] agreement.”
6 *McClain*, 169 Cal. App. 4th at 806.

7 To allege a cognizable claim for a breach of the implied covenant, a plaintiff must allege: “(1)
8 the existence of a contract; (2) plaintiff performed all, substantially performed, or was excused from
9 performing his obligations under the contract; (3) all conditions for defendant’s performance occurred;
10 (4) defendant unfairly interfered with plaintiff’s right to receive the benefits of the contract; and (5)
11 plaintiff was harmed by defendant’s conduct.” *Gonzalez*, 2010 WL 144862 at *17 (citing Judicial
12 Council of California – Civil (CACI) (2009 ed.) § 325) Significantly, “no cause of action for the
13 tortious breach of the implied covenant of good faith and fair dealing can arise unless the parties are in
14 a ‘special relationship’ with ‘fiduciary characteristics.’” *Pension Trust Fund v. Fed. Ins. Co.*, 307 F.3d
15 944, 955 (9th Cir. 2002) (citing *Mitsui Manufacturers Bank v. Superior Court*, 212 Cal. App. 3d 726,
16 730 (1989)).

17 Plaintiff asserts the defendants “had a duty to act in good faith and fair dealing in plaintiff in his
18 request for loan modification.”³ (*Id.*, ¶ 66) Plaintiff contends Shellpoint breached this duty through
19 “failing to review and process the plaintiff’s loan modification request in compliance with federal and
20 state of California loss mitigation laws and regulations, failure to protect the plaintiff’s personal
21 information, and to disclose to the plaintiff a valid verifiable identification of the owner of the
22 plaintiff’s loan and a verifiable authorized loan servicer.” (*Id.*, ¶ 67) In addition, he asserts Freddie
23 Mac breached the covenant through actions such as “refusing to directly provide proof of ownership of
24 the plaintiff’s loan and their authorized agent/loan servicer and failure to protect the plaintiff’s rights to
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26 ³ Even if true, this is insufficient to give rise to a breach of the implied covenant of good faith and fair dealing. An
27 action for the breach of the implied covenant sounds in contract and imposes liability where there is an existing contract
between the parties. It does not impose liability for the failure to comply with statutory duties.

28 Plaintiff does not claim that there was a breach of the implied covenant as it relates to duties imposed related to
the original promissory note.

1 fair dealing by ignoring the plaintiff’s authorized direct contact letters.” (*Id.*, ¶ 68)

2 These facts, as Defendants argue, are not sufficient to support a claim for a breach of the
3 implied covenant of good faith and fair dealing. As explained above, Plaintiff fails to allege facts
4 sufficient to support a conclusion that the parties had a fiduciary relationship. In addition, Plaintiff fails
5 to identify contracts with Freddie Mac and Shellpoint that would give rise to this claim, and fails to
6 identify any express provision that has been frustrated by the conduct of either defendant. Finally,
7 Plaintiff fails to identify damages as a result of the alleged breach. Consequently, his claim for a
8 breach of the covenant of fair good faith and fair dealing is not cognizable, and is **DISMISSED** without
9 leave to amend.

10 **E. Fifth Claim for Relief: Fraud based on Deceit and Misrepresentation⁴**

11 Plaintiff contends Shellpoint is liable for fraud for failure to “review and process the plaintiff’s
12 loan modification requests in compliance or in accordance with federal and state of California loss
13 mitigation laws and regulations.” (Doc. 33 at 18) The burden to establish fraud is “heavy,” *Robi v.*
14 *Five Platters, Inc.*, 918 F.2d 1439, 1444 (9th Cir. 1990), because “when fraud is alleged, ‘a party must
15 state with particularity the circumstances constituting fraud.’” *Kearns v. Ford Motor Co.*, 567 F.3d
16 1120, 1124 (9th Cir. 2009) (quoting Fed. R. Civ. P. 9(b)).

17 The heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure requires
18 that plaintiff “state the time, place, and specific content of the false representations as well as the
19 identities of the parties to the misrepresentation.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066
20 (9th Cir. 2004); *see also Kearns*, 567 F.3d at 1126 (the plaintiff must articulate the “who, what, when,
21 where, and how” of the fraud alleged). “For corporate defendants, a plaintiff must allege the names of
22 the persons who made the allegedly fraudulent representations, their authority to speak, to whom they
23 spoke, what they said or wrote, and when it was said or written.” *Flowers v. Wells Fargo Bank, N.A.*,
24 2011 WL 2748650, at *6 (N.D. Cal. July 13, 2011). Only factual allegations, rather than mere
25 conclusions, satisfy this pleading burden. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540
26 (9th Cir.1989). If the allegations do not meet the heightened pleading standard, the “averments . . .

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28 ⁴ State law “uses the words fraud and deceit interchangeably.” *Gilmore v. Wells Fargo Bank N.A.*, 75 F. Supp. 3d
1255, 1271 (N.D. Cal. 2014).

1 should be disregarded, or stripped from the claim for failure to satisfy Rule 9(b).” *Kearns*, 567 F.3d at
2 1124 (quotations omitted).

3 The second amended complaint does not specifically identify when the disputed statements
4 were made, or that the individuals with whom he spoke had the authority on behalf of Shellpoint.⁵
5 Further, there is no indication that the people with whom Plaintiff communicated acted in a manner
6 intended to deceive Plaintiff or that, in fact, he *was* deceived. As Defendants assert, “[a]t most,
7 plaintiff disagrees with Shellpoint’s handling of his loss mitigation applications and complaints.” (Doc.
8 34 at 11) Without further factual allegations, the Court is unable to find that Plaintiff meets the
9 heightened pleading requirements under Rule 9 for a claim sounding in fraud. *See Kerns*, 567 F.3d at
10 1124; *see also Edwards*, 356 F.3d at 1066. Therefore, Plaintiff’s claim for fraud against Shellpoint is
11 **DISMISSED.**

12 **V. Conclusion and Order**

13 Based upon the foregoing, the Court **ORDERS:**

- 14 1. Defendants’ motion to dismiss is **GRANTED**;
- 15 2. The fourth claim for relief is **DISMISSED without leave to amend**;
- 16 3. The rest of the complaint is **DISMISSED with one final opportunity⁶ to amend**;
 - 17 a. If Plaintiff elects to file a Third Amended Complaint, it **SHALL** be filed within
18 **thirty days** of the date of service of this order. Plaintiff **SHALL NOT** attach exhibits
19 unless they are necessary to demonstrate legally operative facts. The Third Amended
20 Complaint and any attachments thereto must not exceed 40 pages.
 - 21 b. If Plaintiff elects **not** to file a Third Amended Complaint, he **SHALL** notify the
22 Court within thirty days of the date of service of this order. Upon such written notice,
23 the Second Amended Complaint with stand, with the matter proceeding only the second
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26 ⁵ Though Plaintiff’s opposition identifies instances when he contends the defendant lied to him or others, a lie
without more is insufficient to demonstrate fraud.

27 ⁶ The Court will not grant any further leave to amend absent an express showing of an ability to cure the deficient
28 pleading. Thus, the Court urges the plaintiff to review the elements of the claims he wishes to bring and to state factual
allegations to support each element.

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claim for relief for a violation of the Privacy Act remaining.⁷

IT IS SO ORDERED.

Dated: January 11, 2018

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

⁷ In addition, if Plaintiff files such a notice, the Court will dismiss Resurgent Capital Services, LP and Resurgent Mortgage Servicing as defendants, as no claims were brought against these defendants in the Second Amended Complaint.