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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TENISHA TATE-AUSTIN; PAUL AUSTIN; and FAIR HOUSING ADVOCATES OF NORTHERN CALIFORNIA, Plaintiffs, v. JANETTE C. MILLER; MILLER AND PEROTTI REAL ESTATE APPRAISALS, INC., AMC LINKS LLC; Defendants.	Case No.: 3:21-cv-09319-JCS **NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (FRCP 12(b)(6))** **Date: 3/4/22** **Time: 9:30 am** **Department: F**

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 4, 2022 at 9:30 am, or as soon thereafter as the matter may be heard in the above-entitled court, located at the San Francisco Courthouse, Courtroom F – 15th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants Janette C. Miller and Miller and Perotti Real Estate Appraisals, Inc. will move the court to dismiss the action pursuant to FRCP 12(b)(6) because Plaintiffs' complaint fails to state a claim upon which relief can be granted.

The motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, and the pleadings and papers field herein.

Dated: January 10, 2022

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

By: _____
Peter C. Catalanotti
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Real Estate Appraisals, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

a. Parties

Party	Role
Plaintiffs Tenisha Tate-Austin; Paul Austin (collectively, the "Austins")	Homeowners
Plaintiff Fair Housing Advocates of Northern California ("FHANC")	Proclaimed Fair Housing Advocates
Defendants Janette C. Miller; Miller And Perotti Real Estate Appraisals, Inc. (collectively "Miller")	Appraiser
Defendant AMC Links LLC ("AMC Links")	Appraisal Management Company

b. Relevant Allegations

On December 2, 2021, Plaintiffs filed a complaint the Northern District of California against Defendants Janette C. Miller, Miller And Perotti Real Estate Appraisals, Inc., and AMC Links LLC ("Complaint" or "Compl."). Plaintiffs allege that all defendants discriminated against them on the basis of their race by preparing a February 12, 2020 appraisal below the fair market value of the real property they own located at 20 Pacheco Street in Sausalito, CA. ("Property").

On December 19, 2016, the Austins purchased the Property for $550,000. (Compl., ¶38). Between 2016 and 2018, the Austins allege that they undertook substantial remodels to the Property. (Compl., ¶41).

In May 2018, the Austins refinanced the Property. (Compl., ¶42). An appraisal prepared for their lender valued the Property at $864,000. (Compl., ¶42). Subsequently, the Austins renovated the Property again by adding 270 square feet to the original building and began construction on an accessory dwelling unit of 450 square feet. (Compl., ¶¶43-44).

In March 2019, the Austins refinanced the Property again. An appraisal prepared for

their lender valued the Property at $1,450,000. (Compl., ¶45).

In early 2020, the Austins refinanced the Property for a third time. Their mortgage broker retained the services of Defendant AMC Links, LLC ("AMC Links") in order to appraise the Property for the lender. (Compl., ¶46). AMC Links contracted with Miller to appraise the Property. On January 29, 2020, Miller inspected the Property. (Compl., ¶47). On February 12, 2020, Miller provided her appraisal of the Property in which she valued the Property at $995,000. (Compl., ¶53).

Plaintiffs allege that they were shocked by the value provided by Miller. (Compl., ¶68). Plaintiffs allege that their mortgage broker informed them that they could not obtain refinancing at favorable terms because of the value provided by Miller. (Compl., ¶68). The Austins, through their mortgage broker, contacted AMC Links and requested a second appraisal by a different appraiser. (Compl., ¶68).

On February 15, 2020, a second appraiser inspected the Property. On March 8, 2020, the second appraiser provided a value of $1,482,500. (Compl., ¶72).

The Austins allege that they "refinanced their mortgage based on the March 2020 appraisal," but "they were not able to refinance on the favorable terms that had been available one month before." (Compl., ¶77).

c. Mortgage Interest Rates During the Relevant Period.

The Austins allege that while they ultimately "refinanced their mortgage based on the March 2020 appraisal, they were not able to refinance on the favorable terms that had been available one month before." (Compl., ¶77). However, Miller notes that the average mortgage interest rate for 30-year fixed rate mortgages actually *declined* between February and March of 2020.[1] So, it is unclear how or why the Austins were unable to obtain the same or more favorable refinancing terms based upon the March 2020 appraisal.

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[1] http://www.freddiemac.com/pmms/pmms30.html showing an average rate of 3.47% in February 2020 and 3.45% in March 2020

2. Legal Argument

a. Standard for 12(b)(6) Motion

A "party" may assert by a Rule 12(b) motion to dismiss that a plaintiff has failed to state a claim upon which relief can be granted. FRCP 12(b)(6).

A Rule 12(b)(6) motion is similar to the common law general demurrer—i.e., it tests the legal sufficiency of the claim or claims stated in the complaint. *Strom v. United States* (9th Cir. 2011) 641 F3d 1051, 1067; *SEC v. Cross Fin'l Services, Inc.* (CD CA 1995) 908 F.Supp. 718, 726-727 (quoting text); *Beliveau v. Caras* (CD CA 1995) 873 F.Supp. 1393, 1395 (citing text); *United States v. White* (CD CA 1995) 893 F.Supp. 1423, 1428 (citing text).

A Rule 12(b)(6) dismissal is proper when the complaint either: (1) fails to allege a "cognizable legal theory"; or (2) fails to allege sufficient facts "to support a cognizable legal theory." *Caltex Plastics, Inc. v. Lockheed Martin Corp*. (9th Cir. 2016) 824 F3d 1156, 1159; *Coffin v. Safeway, Inc*. (D AZ 2004) 323 F.Supp.2d 997, 1000 (citing text); *see Seismic Reservoir 2020, Inc. v. Paulsson* (9th Cir. 2015) 785 F3d 330, 335—Rule 12(b)(6) dismissal can be based on dispositive legal issue.

In a complaint alleging several distinct claims for relief, a Rule 12(b)(6) motion may be directed to fewer than all of the claims raised. *Godlewski v. Affiliated Computer Services, Inc.* (ED VA 2002) 210 FRD 571, 572; *Miceli v. Ansell, Inc.* (ND IN 1998) 23 F.Supp.2d 929, 931; *Brocksopp Engineering, Inc. v. Bach-Simpson Ltd.* (ED WI 1991) 136 FRD 485, 486.

Likewise, where the complaint reveals on its face that plaintiff lacks capacity to sue (or that defendant lacks capacity to be sued), a Rule 12(b)(6) motion will lie. *See De Saracho v. Custom Food Machinery, Inc*. (9th Cir. 2000) 206 F3d 874, 878; *see also Comstock v. Pfizer Retirement Annuity Plan* (D MA 1981) 524 F.Supp. 999, 1002.

A plaintiff's failure to meet FRCP 9(b)'s heightened pleading requirements for fraud or mistake may provide the basis for a Rule 12(b)(6) motion to dismiss. *ESG Capital Partners, LP v. Stratos* (9th Cir. 2016) 828 F3d 1023, 1031-1032.

b. Appraiser Liability in California

According to the Rutter Group Guide, *California Practice Guide: Real Property Transactions, Financing and Appraisals*:

> Other than in connection with loans by "federally-regulated financial institutions" (which are subject to the Real Estate Appraisers' and Licensing Certification Law, the term "appraisal" has no specific legal definition. Broadly, a real estate appraisal is merely someone's opinion as to the monetary value of a property. While that valuation opinion might be based on a standardized methodology, it is only an opinion, not a scientific fact or legal conclusion. (6:650).

Appraisers who erroneously value a property may be liable to persons who suffer damages in reliance upon the valuation (e.g., lender finances a secured loan in reliance on adequacy of the secured property but subsequently discovers the property was overvalued and thus not sufficient recourse for the loan). *See Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 CA4th 303, 310, fn. 3.

As in any action based upon a breach of duty, plaintiffs proceeding on a theory of professional negligence must meet the threshold burden of establishing that the defendant appraiser owed them a duty of care in making the appraisal. *Nymark v. Heart Fed. Sav. & Loan Ass'n* (1991) 231 CA3d 1089, 1096.

In California, an appraiser designated by a lender to value its borrower's collateral for financing purposes *generally owes its duty of care to the lender, not to the borrower*. Indeed, "[w]hether the lender conducts the appraisal in house or hires an outside appraiser, the considerations are the same. *The appraisal ordered by the lender is for its own protections and the borrower has his or her own means of ascertaining the desirability of the property.*" *Willemsen v. Mitrosilis* (2014) 230 CA4th 622, 629 (emphasis added) (noting borrower should know lender's appraisal is intended for lender's benefit, not to ensure success of borrower's investment); *see also Tindell v. Murphy* (2018) 22 CA5th 1239, 1253-1254—lender's appraiser had no duty of care to borrowers for inaccurate property description as appraisal was intended to support lender's evaluation of collateral, not borrowers' decision whether to purchase property.

For example, an appraiser selected by the Veterans Administration to appraise property that is the subject of a veteran's application for a VA-guaranteed loan is not liable to the

borrower for negligently undervaluing the property, as a result of which the borrower is rendered ineligible for a VA loan and must obtain conventional financing at a greater cost. *Gay v. Broder* (1980) 109 CA3d 66, 75. The VA's statutory duty to appraise property that is the subject of a VA loan application (38 USC § 3710(b)(5)) is designed to protect the federal government from having to assume the responsibility of a guarantor because of inadequate security. Since the statute is directed at protecting the VA and not the loan applicant, the appraiser's duty of care extends only to the VA. Otherwise, "[c]oncern with the possibility of claims against him for refusing to set a value as high as the loan desired … would deter the appraiser from reporting to the [VA] his true opinion as to value and tend to cause him to breach his duty to the federal government. The policy considerations against the imposition of liability in the instant case are manifest." *Gay v. Broder, supra,* 109 CA3d at 75.

c. On all causes of action, Plaintiffs, as borrowers, fail to state a claim upon which relief can be granted against Miller, as an appraiser.

As discussed above, California case law is unequivocal that an appraisal is prepared to protect the collateral of a lender, not for the protection of the borrower. *Willemsen v. Mitrosilis* (2014) 230 CA4th 622; *Tindell v. Murphy* (2018) 22 CA5th 1239. Here, the Austins admit that in 2020 they contacted their mortgage broker to refinance the Property. (Compl., ¶46). Their mortgage broker retained AMC Links to obtain an appraisal. (Compl., ¶46). AMC Links contracted with Miller to obtain an appraisal of the Property. (Compl., ¶47). Since the appraisal by Miller was prepared after the Austins decided to refinance the Property, the Austins cannot reasonably allege that they relied upon the Miller appraisal in making any decision to refinance the Property.

Fatally, the Austins admit that they complained to their mortgage broker about the alleged low value provided by Miller. (Compl., ¶68). The mortgage broker, in turn, contacted AMC Links who contracted with another appraiser to prepare a second appraisal. The Austins further admit that they were able to refinance the Property and that their lender relied upon the second appraisal rather than the Miller appraisal in making the decision to make the loan to

refinance the Property. (Compl., ¶77).

Based upon the allegations, not one individual or entity involved, including the Austins, FHANC, the Austin's mortgage broker, or even AMC Links, actually relied upon the Miller appraisal in making any decisions regarding the Austins refinance. While the Austins generally allege that the one-month delay resulted in them refinancing under less favorable terms, as demonstrated above, the average mortgage interest rate for 30 year fixed rate mortgages actually *declined* between February and March of 2020.[2] As the Court of Appeal held in *Gay*, a borrower cannot sue an appraiser for undervaluing a property that leads to the borrower obtaining a loan on less favorable terms. *Gay v. Broder* (1980) 109 CA3d 66, 75. For these reasons, Plaintiffs fail to state a claim upon which relief can be granted. This Motion should be granted.

d. On all causes of action, Plaintiffs fail to state a claim upon which relief can be granted since they fail to allege any specific facts to show that Miller's decision were based upon race.

The Court should find that Plaintiffs have failed to allege sufficient facts to show that Miller engaged in racial discrimination. First, it is unclear whether Plaintiffs allege that Miller engaged in disparate treatment or disparate impact based upon race.

In order to show disparate *treatment* based on race, "a plaintiff must establish that the defendant was motivated to discriminate against the plaintiff on the basis of race." *Garcia v. Country Wide Financial Corp.*, 2008 WL 7842104, at *7 (C.D. Cal. Jan. 17, 2008) (citing *AFSCME v. State of Washington*, 770 F.2d 1401, 1406-07 (9th Cir. 1985)). According to the 9th Circuit, "liability for disparate treatment hinges upon proof of discriminatory intent." (*AFSCME*, 770 F.2d at 1406). Here, Plaintiffs failed to allege any facts to show that Miller was motivated to discriminate against the Austins based upon their race or that Miller had discriminatory intent when she drafted the appraisal. Plaintiffs allege "five indicia of racial bias in the Miller Appraisal…" (Compl., ¶52). Miller responds to each below.

First, Plaintiffs argue that Miller's low valuation of the home in Marin City indicates her

[2] http://www.freddiemac.com/pmms/pmms30.html showing an average rate of 3.47% in February 2020 and 3.45% in March 2020

racism:

> The Miller Appraisal opines that the price of single-family homes in Marin City is between $270,000 to $1,800,000, with a "predominate value" of $720,000. Miller states that this opinion is based on five years of home sales, where no one year had more than four sales.

According to Plaintiffs, Miller estimated home values in Marin City to be between $270,000 to $1,800,000. However, Miller valued the Subject Property at $995,000. (Compl., ¶1). A subsequent appraiser valued it at $1,482,500. (Compl., ¶2). Both of these values are within Miller's estimates for Marin City. On its face, it is unclear how these estimates are evidence of racial discrimination in general and of any racial discrimination directly against the Austins.

According to Plaintiffs,

> This opinion is fundamentally flawed because of the small number of home sales per year and the number of years of home sales evaluated. Using such a small sample size results in a huge margin of error. In fact, the relatively small number of sales in Marin City suggests a marketplace where owners do not move often. As a result, extrapolating the value of the Pacheco Street House from sales in Marin City is inherently flawed and statistically unsound. It also evidences an approach to appraisal value that is based on the racial demographics of Marin City, or the race of the residents of the Pacheco Street House, or both. (Compl., ¶54).

Plaintiffs simply conclude that the small number of years and use of a sample size equates to racial discrimination. The Court should decline to infer racial discrimination based upon Miller's use of a small sample size and small number of years for comparable sales in her analysis. The allegations fail to show an intent to discriminate.

Next, Plaintiffs allege that:

> Miller states in her report that Marin City has a 'distinct marketability which differs from the surrounding areas.' Based on the racial demographics and history of Marin City, this phrase is coded based on race… Marin City has such a small number of home sales from year to year that there is not a statistically significant and legitimate basis on which to conclude that it has a "distinct marketability." (Compl., ¶55).

Plaintiffs fail to allege any facts to support their allegation that stating that an area has a "distinct marketability" shows that Miller discriminated against the Austins based upon their

race. It is self-evident that every geographical area would have some sort of distinct marketability. If Plaintiffs' argument is accepted, any appraiser who used the term "distinct marketability" to describe a home in Marin City would be liable for racial discrimination.

Next, Plaintiffs argue that Miller must be engaged in racial discrimination since she allegedly used "dated market trends…" (Compl., ¶57). To support this allegation, Plaintiffs allege that:

> Marin City, like other communities that are predominantly non-white in the United States, experienced foreclosures during the Great Recession at a higher rate than predominantly white communities. The relatively higher rate of foreclosures in non-white communities is directly linked to the history of redlining, segregation, discrimination, and lack of access to credit in such communities. Accordingly, considering "market trends" from 2008 disproportionately and inappropriately devalues property in Marin City, because more than ten years have passed and the market value for single-family housing in the area has rebounded entirely…" (Compl., ¶57).

The fact that Miller allegedly used dated marketing trend information does not mean that she discriminated against the Austins. Plaintiffs fail to show how Miller's use of allegedly dated real estate market trends actually impacted the appraised value in any way.

Next, Plaintiffs take issue with Miller's choice of comparable properties used in her appraisal. (Compl., ¶¶59-61). According to Plaintiffs,

> Miller selected five property sales and one sale listing as comps in analyzing the value of the Pacheco Street House. Despite the paucity of recent sales in Marin City, three of the six comps selected by Miller were in Marin City. Two of those three properties were not comparable to the Pacheco Street House in any way *except for their location in Marin City*. One was a bank-owned property that sold in foreclosure a full two years before. One was an attached dwelling that was contained within a planned unit development. (Compl., ¶59)(emphasis added).

From Plaintiffs' issues with Miller's comparable properties, Plaintiffs conclude that "Many [properties] would have proven more comparable than the comps selected by Miller if race had not been a consideration. (Compl., ¶60). However, there is nothing inherently racist about choosing comparable properties that are located in the same city as the Subject Property. Without any direct (or indirect) evidence of actual racial discrimination, Miller's choice of comparable properties cannot support Plaintiffs' claim of discrimination.

Finally, Plaintiffs take issue with adjustments made to the values of comparable

properties in the appraisal. (Compl., ¶¶61-61). According to Plaintiffs, "[t]here are not enough property sales in Marin City to assert that there is any statistical average 'price per square foot' for houses in Marin City as compared with Mill Valley or Sausalito…" (Compl., ¶61). According to Plaintiffs, these adjustments in the value of the comparables "can be explained only by race-based bias." (Compl., ¶62). However, routine adjustments to the values of comparable properties used in an appraisal does not support Plaintiffs' argument that Miller engaged in intentional racial discrimination or evidence an intent to discrminate.

Notably, 42 U.S.C. §3605 states,

> Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

None of the "indicia" alleged by Plaintiffs shows that Miller was motivated to discriminate against the Austins on the basis of race. Each of the "indicia" alleged by Plaintiffs could equally be explained by non-discriminatory factors. Plaintiffs do not allege that Miller treated any other borrowers differently than the Austins. Even if they did, that would not not necessarily indicate a discriminatory motive. *See, e.g., Thomas v. San Francisco Housing Authority*, 2017 WL 878064, at *4-5 (N.D. Cal. Mar. 6, 2017) (dismissing disparate treatment claim on the basis that impact-related allegations do not suffice to allege intentionally discriminatory conduct); *see also Hamilton v. Lincoln Mariners Assocs. Ltd.*, 2014 Wl 5180885, at *5 (S.D. Cal Oct. 14, 2014) (holding that dismissal was proper where the complaint failed to allege sufficient factual material to permit the inference that defendants' action were "more likely than not motivated by discriminatory criteria").

Plaintiffs allege in passing that "In the alternative, or in addition, the methods of valuation used by Miller had a disparate *impact* on African American homeowners or home purchasers based on their race." (Compl., ¶66). However, Plaintiffs fail to allege any facts that show how Miller's appraisal for the Austin's refinance would impact any other homeowners. Therefore, this argument should be ignored.

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e. Plaintiffs' First Claim for Violation of the Fair Housing Act 42 U.S.C. § 3601 et seq. fails to state a claim upon which relief can be granted.

Plaintiffs allege that all defendants injured Plaintiffs by committing the following discriminatory housing practices:

> Otherwise making unavailable or denying housing opportunities based on race, in violation of 42 U.S.C. § 3604 (a).
>
> For any person or other entity whose business includes engaging in residential real estate-related transactions, including the appraising of residential real properties, to discriminate against any person in making available such a transaction, or in the performance of such services, because of race, in violation of 42 U.S.C. § 3605(a); 24 C.F.R. §§ 100.110(b); 100.135 (a) and (d).
>
> Interfering with any person in the exercise or enjoyment of any right granted or protected by the Fair Housing Act, including 42 U.S.C. §§ 3604, 3605, 3606, in violation of 42 U.S.C. § 3617.
>
> Making or printing a statement with respect to the sale of a dwelling that indicates preference, limitation, or discrimination based on race, or an intention to make such a preference, limitation or discrimination, in violation of 42 U.S.C. § 3604(c).

Miller incorporates her prior arguments into this section as though set out completely.

i. The FHA does not apply to the refinance of the Subject Property.

The Federal Fair Housing Act ("FHA") (42 U.S.C. §§ 3601 to 3631) applies to all residential dwellings, including mobilehomes, unless otherwise excepted. *Colony Cove Associates v. Brown* (1990) 220 Cal. App. 3d 195, 201; *U.S. v. Warwick Mobile Home Estates, Inc.*, 537 F.2d 1148, 1150 (4th Cir. 1976). The Act does not apply to any dwelling solely because it is subject to a mortgage or trust deed held by an institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation. 42 U.S.C. § 3603(a)(1).

Pursuant to § 3603, the FHA applies to:

> (A) dwellings owned or operated by the Federal Government;
> (B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government…;
> (C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government…: Provided, That nothing contained in subparagraphs (B) and (C) of this subsection shall be applicable to dwellings solely by virtue of the fact that they are subject to mortgages held by an FDIC or FSLIC institution; and

> (D) dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under loan or grant contracts entered into after November 20, 1962.

Here, the Subject Property (and attempted refinance) does not fit under any of these categories. Plaintiffs do not allege that the subject refinance loan was "insured, guaranteed, or otherwise secured by the credit of the Federal Government…" 42 U.S.C. § 3603(a)(1)(C). Plaintiffs make reference to FHA guaranteed bank loans (Compl., ¶17) but do not allege that the subject loan was a loan guaranteed by the Federal Government. Notably, the FHA does not typically apply to the private sale or rental of a single family house by an owner. 42 U.S.C. § 3603(b). For these reasons, the FHA does not apply to the Subject Property.

ii. Claim under 42 U.S.C. § 3604(a)

As to the claim made under 42 U.S.C. § 3604(a), Plaintiffs fail to state a claim upon which relief can be granted because they have not alleged that Miller made unavailable or denied housing opportunities based on race. Plaintiffs claim that Miller performed an appraisal on a home that the Austins *already owned*. (Compl., ¶1). Furthermore, the Austins admit that they were able to complete the refinance transaction. (Compl., ¶77). Therefore, Plaintiffs failed to allege that Miller made unavailable or denied Plaintiffs any housing opportunities.

From the undersigned's research, only two cases brought under this statute relate to appraisals. Neither of the cases were brought against the appraisers themselves.

In *Hanson v. Veterans Admin.*, C.A.5 (Tex.) 1986, 800 F.2d 1381, District Court for the Southern District of Texas, James DeAnda, J., granted VA's motion to dismiss, and plaintiffs appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) evidence regarding Veterans Administration's appraisal practices in operating home loan guaranty program supported finding that low VA appraisals of property in racially mixed neighborhood were not result of discriminatory intent, and (2) statistical evidence was insufficient to establish that the appraisals resulted in a racially based negative impact on home value in the area. The present case is distinguishable since in *Hanson* the appraiser was not named as a defendant.

In *Steptoe v. Savings of America*, N.D.Ohio 1992, 800 F.Supp. 1542, prospective purchasers of a home brought an action *against a mortgage lender* under the FHA and civil rights statutes alleging racially discriminatory appraisal and lending practices. *Steptoe* is distinguishable from the current case because the plaintiffs sued Savings of America ("SOA"), the lender. The Court laid out the elements of a prima facie case under §3604, as follows:

> The parties have cited, and this Court is aware of, only one case dealing with the elements of a prima facie case under §§ 3604 and 3605 where the discrimination alleged is based on a defendant's appraisal practices. In that case, *Old West End Ass'n. v. Buckeye Fed. Sav. & Loan*, 675 F. Supp. 1100 (N.D. Ohio 1987), a white couple had attempted to purchase a home in the Old West End of Toledo. The court, applying the analysis enunciated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), held that the plaintiffs had made out a prima facie case under both the Fair Housing Act and the Civil Rights Act by establishing that:
>
> (1) the housing sought to be secured was in a minority neighborhood;
>
> (2) that an application for a loan to purchase the housing located in a minority neighborhood was made;
>
> (3) that an independent appraisal concluded that the value of the housing equaled the sale price;
>
> (4) that the buyers were credit worthy; and
>
> (5) that the loan was rejected.

Here, Plaintiffs cannot satisfy these elements against Miller. They have not alleged that any housing was "sought." They have not alleged that the Subject Property was in a minority neighborhood. In fact, they argue that the Subject Property was not located in a minority neighborhood or at least that Miller should have considered comparable properties in other neighborhood to obtain her valuation. (Compl., ¶¶54-55). Further, Plaintiffs do not allege that there was an application to purchase any property, that an independent appraisal concluded the value of the housing equaled the sales price or that the loan was rejected. In fact, Plaintiffs allege that their loan was accepted and they were able to refinance the Subject Property. (Compl., ¶77). Therefore, the Court should find that Plaintiffs cannot state a claim upon which relief can be granted under 42 U.S.C. § 3604 (a).

iii. Claim under 42 U.S.C. § 3605(a); 24 C.F.R. §§ 100.110(b); 100.135 (a)

and (d).

42 U.S.C. §3605 states,

> (a) It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

Of the cases brought under 42 U.S.C. § 3605(a), only two cases relate to appraisers.

The first case, *Steptoe v. Savings of America*, N.D.Ohio 1992, 800 F.Supp. 1542, is inapplicable and distinguishable as discussed above.

The second case, *Latimore v. Citibank, F.S.B.*, N.D.Ill.1997, 979 F.Supp. 662, affirmed 151 F.3d 712, involved allegations that the denial of a loan application violated the FHA. In *Latimore*, the Court granted the lender and appraisers' motion for summary judgment finding that the plaintiff failed to establish a prima facie case that the denial of their loan application was discriminatory. In the present case, the Plaintiffs' loan application was approved and they were able to refinance the property. (Compl., ¶77). Therefore, the analysis in *Latimore*, even if the Court had granted relief against an appraiser, is distinguishable.

24 C.F.R. §§ 100.110(b) states:

> (b) It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

None of the decisions citing this code section relate to appraiser liability. This Court should decline Plaintiff's novel theory to apply this section to appraisers.

24 C.F.R. § 100.135 (a) and (d) states:

> (a) It shall be unlawful for any person or other entity whose business includes engaging in the selling, brokering or appraising of residential real property to discriminate against any person in making available such services, or in the performance of such services, because of race, color, religion, sex, handicap, familial status, or national origin.
>
> (d) Practices which are unlawful under this section include, but are not limited to:

> (1) Using an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status, or national origin.
>
> (2) Conditioning the terms of an appraisal of residential real property in connection with the sale, rental, or financing of a dwelling on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin.

The plain language of the statute shows that it cannot be applied to the present case. While the statute makes "[u]sing an appraisal…" unlawful, here Plaintiffs admit that the Miller appraisal was not ultimately used in the refinance transaction. (Compl., ¶77). From the undersigned's research, none of the decisions citing this code section relate to appraiser liability. This Court should decline Plaintiff's novel theory to apply this section to a claim by borrower against an appraiser in a refinance transaction. For these reasons, the Court should grant Miller's motion to dismiss as to the first claim for violation of the FHA.

f. Plaintiffs' Second Claim for Violation of California Fair Employment and Housing Act Cal. Gov't Code §§ 12927, 12955 et seq. fails to state a claim upon which relief can be granted.

Miller incorporates her prior arguments into this section as though set out completely. §12955 states, in relevant part,

> (2) For any person or other entity whose business includes performing appraisals, as defined in subdivision (b) of Section 11302 of the Business and Professions Code, of residential real property to discriminate against any person in making available those services, or in the performance of those services, because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, source of income, disability, genetic information, veteran or military status, or national origin.

From the undersigned's research, none of the decisions citing this code section relate to appraiser liability. For the reasons stated above, Plaintiffs have failed to allege sufficient facts to show that Miller had any discriminatory intent when she drafted her appraisal. The Court should grant Miller's motion to dismiss as to the second claim.

g. Plaintiffs' Third Claim for Violation of the Civil Rights Act of 1866 42 U.S.C. § 1981 fails to state a claim upon which relief can be granted.

Miller incorporates her prior arguments into this section as though set out completely. 42 U.S.C. § 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

On its face, the statute does not apply to the facts of this case. Of the cases brought under 42 U.S.C. § 1981, only two cases relates to appraisers. The first case, *Latimore v. Citibank, F.S.B.*, N.D.Ill.1997, 979 F.Supp. 662, affirmed 151 F.3d 712, discussed above, is distinguishable the reasons argued above.

The second case, *Mathis v. United Homes*, LLC, E.D.N.Y.2009, 607 F.Supp.2d 411 is also distinguishable. In *Mathis*, first-time homebuyers brought an action against real estate companies, mortgage lenders, appraisers, and others, alleging defendants conspired to sell them *overvalued*, defective homes financed with predatory loans due to their status as minorities in violation of Fair Housing Act (FHA), Civil Rights Act, and state consumer protection and anti-discrimination laws, and asserting state-law claims for fraud, conspiracy to commit fraud, and negligence. Defendants asserted cross-claims against each other, seeking contribution and/or indemnity in the event of liability. Appraiser defendants moved to dismiss the cross-claims against them. The Court granted the appraisers motions to dismiss the cross-complaints of the lenders in this action. Since the case involved *overvaluing* property and specifically cross-complaints against the appraiser defendants by the lender defendants, the case is distinguishable from the instant case factually and procedurally. For these reasons, the Court should grant Miller's motion to dismiss as to the third claim.

h. Plaintiffs' Fourth Claim for Violation of the Civil Rights Act of 1866 42 U.S.C. § 1982 fails to state a claim upon which relief can be granted.

Miller incorporates her prior arguments into this section as though set out completely. 42 U.S.C. § 1982 states:

> All citizens of the United States shall have the same right, in every State and

> Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

On its face, the allegations do not allege a violation of the Civil Rights Act. Of the cases brought under 42 U.S.C. § 1982, only two cases relates to appraisers. The first case, *Mathis v. United Homes, LLC*, E.D.N.Y.2009, 607 F.Supp.2d 411 discussed above, is distinguishable the reasons argued above. The second case, *Latimore v. Citibank, F.S.B.*, N.D.Ill.1997, 979 F.Supp. 662, affirmed 151 F.3d 712, also discussed above, is distinguishable the reasons argued above. The Court should grant Miller's motion to dismiss as to the fourth claim.

i. Plaintiffs' Fifth Claim for Violation of Unruh Civil Rights Act, Cal. Gov't Code § 51 et seq. fails to state a claim upon which relief can be granted.

Miller incorporates her prior arguments into this section as though set out completely. The Unruh Civil Rights Act ("Unruh Act") provides protection for all persons within the jurisdiction of California from arbitrary and intentional discrimination by all California business establishments, including housing and public accommodations. None of the decisions citing the Unruh Act involve a claim against an appraiser. This Court should decline Plaintiff's invitation to be the first court to allow a borrower to make a claim against an appraiser under the Unruh Act.

An Unruh plaintiff must establish that a Defendant denied, or aided or incited a denial of, or discriminated or made a distinction that denied a plaintiff the full and equal accommodations, advantages, facilities, privileges or services of a business establishment doing business in California based upon race. Here, Plaintiffs have failed to allege that they were denied full and equal accommodations, advantages, facilities, privileges or services of any business establishment. Plaintiffs actually plead that they were able to obtain a second appraisal that came in at a higher value that allowed them to refinance their property. (Compl., ¶77).

In addition, the plaintiff must establish that (1) the substantial motivating reason for defendant's conduct was defendant's perception of plaintiff's Unruh Act protected class (here, race) (2) plaintiff was harmed; and (3) defendants' conduct was a substantial factor in causing plaintiff's harm. (See CACI No. 3060.). Here, Plaintiffs have not alleged any facts to show that

they were harmed by the Miller appraisal.

The Unruh Act requires a showing of intentional discrimination (unless the claim is also a violation of the Americans with Disabilities Act). *Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1149. Here, Plaintiffs' allegations are contradictory. Without any facts, Plaintiffs generally allege that all "defendants have engaged in intentional and arbitrary discrimination in the operation of a business establishment…" (Compl., ¶97). However, later in the Complaint, plaintiffs allege that "[a]lthough one or more defendants may have honestly believed that the representations were true, those defendants had no reasonable grounds for believing the representations were true when they made them." (Compl., ¶104). Plaintiffs' claims are both conclusory and contradictory. Therefore, the Court should find that Plaintiffs have failed to allege any specific facts to show that Miller engaged in intentional discrimination.

The Court should grant Miller's motion to dismiss as to the fifth claim.

j. Plaintiffs' Sixth Claim for Violation of the Unfair Competition Law ("UCL") Cal., Bus. & Prof. Code § 17200 et seq. fails to state a claim upon which relief can be granted.

Miller incorporates her prior arguments into this section as though set out completely. The primary defense to a UCL "unlawful" practices claim is to establish a defense to the "borrowed" law. Numerous courts hold that this is also a defense to the UCL "unlawful" claim. *Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 CA4th 700, 718; *Lazar v. Hertz Corp.* (1999) 69 CA4th 1494; *People v. Duz-Mor Diagnostic Lab., Inc.* (1998) 68 CA4th 654.

To the extent that the Court finds that Miller has not violated any of the laws alleged above, it must find that Plaintiffs have not pled a cause of action under the unlawful prong of the UCL.

Several cases have held that UCL claims alleging "unlawful" business practices require some *specificity*. In *Khoury v. Maly's of Calif., Inc.* (1993) 14 CA4th 612, 616, 17 CR2d 708, 710, for example, the court of appeal affirmed the trial court's sustaining of a demurrer to a § 17200 claim without leave to amend. After three attempts to replead, plaintiff still had not

identified which section of the law had been violated, nor had plaintiff described with any reasonable particularity the facts supporting the violation. Rather, the complaint merely alleged that "defendants breached [§ 17200] by refusing to sell [the products] to plaintiff, for the purpose of ruining and interfering with his beauty supply business, with the effect of misleading plaintiff's customers." *Accord, Doe v. CVS Pharmacy, Inc*. (9th Cir. 2020) 982 F3d 1204, 1214-1215—plaintiffs cannot merely cite a regulation that was allegedly violated (must allege facts demonstrating how defendant violated the regulation); *Bacon ex rel. Maroney v. American Int'l Group* (ND CA 2006) 415 F.Supp.2d 1027, 1034—plaintiff may not "simply set forth a catalog of statutes that purportedly were violated" (must allege the factual basis that each such statute was violated); *Silicon Knights, Inc. v. Crystal Dynamics, Inc*. (ND CA 1997) 983 F.Supp. 1303, 1316—dismissing UCL claim with leave to amend for failure to allege conduct with "reasonable particularity"; *Marshall v. Standard Ins. Co.* (CD CA 2000) 214 F.Supp.2d 1062.

Here, for the reasons argued above, Plaintiffs have failed to specifically allege a violation of any specific law. Therefore, the Motion should be granted as to the UCL claim.

k. Plaintiffs' Seventh Claim for Negligent Misrepresentation fails to state a claim upon which relief can be granted.

Miller incorporates her prior arguments into this section as though set out completely. The elements of a claim for negligent misrepresentation are a misrepresentation of fact, lack of reasonable grounds, a duty to plaintiff, intent to induce reliance, reliance, causation and harm. *Majd v. Bank of America, N.A.* (2015) 243 CA4th 1293, 1307.

Here, as discussed above, California law is clear that an appraiser owes no duty to a borrower with regard to the accuracy of an appraisal. *See Willemsen v. Mitrosilis* (2014) 230 CA4th 622, 629 (noting borrower should know lender's appraisal is intended for lender's benefit, not to ensure success of borrower's investment); *see also Tindell v. Murphy* (2018) 22 CA5th 1239, 1253-1254 finding that the lender's appraiser had no duty of care to borrowers for inaccurate property description as appraisal was intended to support lender's evaluation of collateral, not borrowers' decision whether to purchase property. Both the Court in *Willemsen*

and *Tindell* affirmed the dismissal of claims for negligent misrepresentation by a borrower against an appraiser.

Furthermore, Plaintiffs have not alleged that they *relied* upon the appraisal in any detrimental way. Plaintiffs generally allege that "Plaintiffs reasonably relied on defendants' representations and were harmed in doing so." (Compl., ¶105). However, the facts alleged belie this argument. In response to Miller's appraised value, Plaintiffs alleged that they were shocked by Miller's appraised value, that they "through their broker, contacted AMC Links and requested a second appraisal by a different appraiser…" (Compl., ¶68). However, according to Plaintiffs, a second appraisal appraised their property and they were able to refinance based upon that appraisal. (Compl., ¶77). Therefore, Plaintiffs have failed to allege that any individual or entity relied upon the Miller appraisal in making any decision. For these reasons, the Motion should be granted.

3. Conclusion

For the reasons stated above, the Court should grant this Motion.

Dated: January 10, 2022

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

By: _____
Peter C. Catalanotti
Madonna Herman
Attorneys for Defendants,
Janette C. Miller and Miller and Perotti
Real Estate Appraisals, Inc.

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. I am employed by in the County of San Francisco, State of California. My business address is 525 Market Street, 17th Floor, San Francisco, California 94105. My business Facsimile number is (415) 434-1370. On this date I served the following document(s):

NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (FRCP 12(B)(6))

on the person or persons listed below, through their respective attorneys of record in this action, by the following means of service:

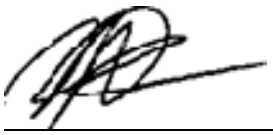
☐: By United States Mail. I placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☒: **BY E-MAIL** - Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

EXECUTED on January 10, 2022, in San Francisco, California.



Michael Folger

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