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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDILBERTO LUMALU, BRIAN)
DIETZ, BRENDA DIETZ,)
CANDICE MCDONALD, AS)
INDIVIDUALS AND ON)
BEHALF OF ALL OTHERS)
SIMILARLY SITUATED,)

Plaintiffs,)

v.)

M.D.C. HOLDINGS, INC.)
(d/b/a "RICHMOND)
AMERICAN"); RICHMOND)
AMERICAN HOMES OF)
CALIFORNIA, INC;)
HOMEAMERICAN MORTGAGE)
CORPORATION; AND DOES 1)
THROUGH 10, INCLUSIVE,)

Defendants.)

Case No. EDCV 09-01669
VAP(OPx)

**[Motion filed on January 22,
2010]**

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS FOR LACK
OF STANDING, WITH PREJUDICE,
AND DENYING DEFENDANTS'
MOTION TO STRIKE AS MOOT**

Defendants' Motions to Dismiss and to Strike came before the Court for hearing on March 15, 2010. After reviewing and considering all papers filed in support of, and in opposition to, the Motions, as well as the arguments advanced by counsel at the hearing, the Court

1 GRANTS the Motion to Dismiss and DENIES the Motion to
2 Strike as moot.

3
4 **I. BACKGROUND**

5 **A. Plaintiffs' Allegations**

6 Plaintiff Edilberto Lumalu ("Lumalu") alleges he
7 purchased a new residence in November 2005 in Riverside
8 County, California from Defendant Richmond American
9 Homes, made a down payment of more than 20% of the total
10 purchase price, financed the balance through HomeAmerican
11 Mortgage, and still owns and occupies the residence.
12 (First Amended Complaint ("FAC") ¶ 38.)

13
14 Plaintiffs Brian Dietz and Brenda Dietz allege they
15 purchased a new residence in December 2005 in Riverside
16 County, California from Richmond American Homes, made a
17 down payment of 45% of the total purchase price, and
18 still own and occupy the residence. (FAC ¶ 39.)

19
20 Plaintiff Candice McDonald ("McDonald") alleges she
21 purchased a new residence in April 2006 in Riverside
22 County, California from Defendant Richmond American
23 Homes, made a down payment of 40% of the total purchase
24 price, financed the balance through HomeAmerican
25 Mortgage, and still owns and occupies the residence (FAC
26 ¶ 40.) McDonald also alleges Richmond American Homes
27 paid \$20,000 toward the purchase price of the house when
28

1 she agreed to use Richmond American Homes' mortgage
2 company, HomeAmerican Mortgage. (Id.)

3
4 Plaintiffs Lumalu, Brian Dietz, Brenda Dietz, and
5 McDonald (collectively, "Plaintiffs") bring this putative
6 class action on behalf of themselves and a national class
7 including "[a]ll Richmond American Homes customers who
8 purchased a new Richmond American Homes house from
9 January 1, 2004, through December 31, 2006, and put 20%
10 or more down toward the purchase of the house[,] or
11 alternatively, "a class of new Richmond American Homes
12 customers whose homes are located in California." (FAC
13 ¶¶ 53-54.)

14
15 Plaintiffs allege "on information and belief" that
16 before 2004, Defendants MDC Holdings Inc. (doing business
17 as Richmond American), Richmond American Homes of
18 California Inc., and HomeAmerican Mortgage Corporation
19 (collectively, "Defendants" or "Richmond Defendants")
20 implemented a "scheme" to increase the number of houses
21 sold and to increase the amount of profit per sale. (FAC
22 ¶ 21.) The "scheme" was intended to "convince government
23 entities, then the community, and finally buyers that
24 Defendants were building a traditional neighborhood with
25 stable owners who occupied their homes and who were
26 vested in the community and the neighborhood." (FAC ¶
27 22.) "Implicit in this marketing scheme was that
28

1 Defendants were making a good-faith effort to sell homes
2 to buyers who [Defendants] expected could afford to buy
3 the houses and would be stable neighbors." (Id.)
4

5 Plaintiffs allege that they were provided "marketing
6 materials that depicted the community as a stable,
7 family[-]based neighborhood." (FAC ¶¶ 38, 39, 40.)

8 Plaintiffs also allege "on information and belief" that
9 Defendants represented that Defendants did not sell
10 houses in their neighborhoods to investors who would not
11 occupy the houses. (FAC ¶¶ 41, 43, 49, 50.)
12

13 Plaintiffs allege Defendants engaged in a scheme to
14 market the houses to, and provide financing for,
15 "unqualified buyers who posed an abnormally high risk of
16 foreclosure . . . to increase both the number of sales
17 and the prices of the houses in same neighborhoods in
18 which Defendants were selling to traditionally qualified
19 and low-foreclosure- risk buyers." (FAC ¶ 23.)

20 Plaintiffs generally allege that Defendants assisted and
21 encouraged the "unqualified" buyers to appear qualified.
22 (FAC ¶ 26.)
23

24 Plaintiffs assert that Defendants "concealed and
25 intentionally failed to disclose to prospective buyers .
26 . . that numerous houses in the neighborhoods were being
27 purchased by unqualified and high-foreclosure-risk
28

1 buyers, despite Defendants' knowledge that this could,
2 and likely would over time, have a material negative
3 effect on the value and desirability of the house and the
4 neighborhood." (FAC ¶ 32.)

5
6 Plaintiffs allege two theories of harm stemming from
7 Defendants' conduct. First, Plaintiffs allege they "paid
8 inflated prices for their houses" as a result of
9 Defendants' failure to disclose that "Defendants had sold
10 houses . . . to unqualified and high-foreclosure-risk
11 buyers. . . [and] to investors who would not occupy the
12 houses." (FAC ¶¶ 49, 52.) Secondly, Plaintiffs allege
13 they suffered an injury years after purchasing their
14 houses when the real estate market declined and the
15 "unqualified" buyers defaulted on their loans and lost
16 their houses in foreclosure proceedings, which led to a
17 decline in the value of Plaintiffs' residences. (FAC ¶¶
18 29, 32, 34, 52.)

19
20 **B. Procedural History**

21 On September 3, 2009, Plaintiffs Lumalu, Brian Dietz,
22 and Brenda Dietz filed a putative class action against
23 the Richmond Defendants and Richmond American Homes
24 Corporation. On the same day, Plaintiff's counsel filed
25 seven other similar class actions¹ ("Homebuilder

26 _____
27 ¹ The Homebuilder Actions are:

- 28 • Dodaro v. Standard Pacific Corp., et al., ED09-
(continued...)

1 Actions") alleging that the homebuilder defendants and
2 their mortgage lending affiliates engaged in conduct that
3 "artificially inflated" the purchases prices of
4 plaintiffs' residences and eventually reduced their
5 value.

6
7 On October 23, 2009, the Richmond Defendants and
8 Richmond American Homes Corporation joined in a "Motion
9 to Consolidate," which sought to consolidate the eight
10 Homebuilder Actions. The Court denied the Motion to
11 Consolidate. On November 18, 2009, the Homebuilder
12 Actions were transferred to this Court. On December 21,
13 2009, Plaintiffs Lumalu, Brian Dietz, Brenda Dietz, and a
14 newly added plaintiff, Plaintiff McDonald, filed the FAC,
15 which added allegations regarding the Defendants. The
16 substance of the claims remains unchanged. On January
17 28, 2010, Plaintiffs dismissed all claims against
18 Defendant Richmond American Homes Corporation.

19 _____
20 ¹(...continued)

CV1666-VAP (OPx)

- 21 • Stephens, et al. v. Lennar Corp, et al., ED09-CV1668-
VAP (DTBx)
- 22 • Lumalu et al. v. Richmond American Homes Corp., et
al., ED09-CV1669-VAP (OPx)
- 23 • Oneto v. The Ryland Group, Inc., et al., ED09-CV1670-
VAP (DBTx)
- 24 • Maya, et al. v. Centex Corp., et al., ED09-CV1671-VAP
(OPx)
- 25 • Martinez, et al. v. D.R. Horton, et al., ED09-CV1672-
VAP (DBTx)
- 26 • Nielson, et al. v. Shea Homes, Inc, et al., ED09-
CV1673-VAP (DTBx)
- 27 • Kelly, et al. v. Beazer Homes USA, Inc., et al.,
ED09-CV1674-VAP (DTBx)

28

1 Plaintiffs allege five claims: (1) fraud; (2)
2 negligent misrepresentation; (3) violation of
3 California's Unfair Business Practices Act, Cal. Bus. &
4 Prof. Code §§ 17200, et seq.; (4) violation of Cal. Bus.
5 & Prof. Code §§ 17500, et seq.; and (5) breach of the
6 implied covenant of good faith and fair dealing.

7
8 On February 1, 2010, Defendants filed: (1) a Motion
9 to Dismiss the First Amended Complaint ("Motion"), (2) a
10 Request for Judicial Notice ("RJN"), and (3) a Motion to
11 Strike Portions of the First Amended Complaint. On
12 February 22, 2010, Plaintiffs filed Opposition² to both
13 Motions. On March 4, 2010, Defendants filed a Reply for
14 both Motions.

15
16 In their Motion to Dismiss, Defendants incorporate by
17 reference the arguments advanced by defense counsel in
18 Stephens, et al. v. Lennar Corp, et al., ED09-CV1668-VAP
19 (DTBx) and Nielson, et al. v. Shea Homes, Inc, et al.,

20
21 ² Counsel for the plaintiffs in the eight Homebuilder
22 Actions divides the subject matter of their Oppositions
to Homebuilder Defendants' Motions as follows:

- 23 • Stephens, et al. v. Lennar Corp, et al., ED09-CV1668-
VAP (DTBx): Plaintiffs' Opposition addresses
constitutional standing ("Stephens Opp'n").
- 24 • Oneto v. The Ryland Group, Inc., et al., ED09-CV1670-
VAP (DBTx): Plaintiffs' Opposition addresses
25 Plaintiffs' UCL claims and claims for breach of the
implied covenant of good faith and fair dealing
26 ("Oneto Opp'n").
- 27 • Nielson, et al. v. Shea Homes, Inc, et al., ED09-
CV1673-VAP (DTBx): Plaintiffs' Opposition addresses
28 Rule 9 ("Nielson Opp'n").

1 ED09-CV1673-VAP (DTBx). (Mot. at 11-12.) Defendants
2 argue the FAC should be dismissed for the following
3 reasons: (1) Plaintiffs lack constitutional standing to
4 bring this action; (2) Plaintiffs fail to allege their
5 fraud-based claims with particularity as required by Rule
6 9(b); (3) Plaintiffs fail to state a claim as to each
7 cause of action under 12(b)(6). (Mot. at 1-2.)

8 Defendants also assert that Plaintiffs fail to state a
9 claim against MDC Holdings, Inc. under an alter ego or
10 vicarious liability theory.³ (Mot. at 12.)

11
12 **II. LEGAL STANDARD FOR MOTION TO DISMISS UNDER**
13 **RULE 12(b)(6)**

14 Rule 12(b)(6) allows a party to bring a motion to
15 dismiss for failure to state a claim upon which relief
16 can be granted. As a general matter, the Federal Rules
17 require only that a plaintiff provide "'a short and plain
18 statement of the claim' that will give the defendant fair
19 notice of what the plaintiff's claim is and the grounds
20 upon which it rests." Conley v. Gibson, 355 U.S. 41, 47
21 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic
22 Corp. v. Twombly, 550 U.S. 544, 555 (2007). In addition,
23 the Court must accept all material allegations in the
24 complaint -- as well as any reasonable inferences to be
25 drawn from them -- as true. See Doe v. United States,

26
27 _____
28 ³ It was not necessary to reach this argument in resolving this Motion.

1 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S.
2 Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005).

3
4 "While a complaint attacked by a Rule 12(b)(6)
5 motion to dismiss does not need detailed factual
6 allegations, a plaintiff's obligation to provide the
7 'grounds' of his 'entitlement to relief' requires more
8 than labels and conclusions, and a formulaic recitation
9 of the elements of a cause of action will not do." Bell
10 Atlantic, 550 U.S. at 555 (citations omitted). Rather,
11 the allegations in the complaint "must be enough to raise
12 a right to relief above the speculative level." Id.

13
14 In other words, the allegations must be plausible on
15 the face of the complaint. See Ashcroft v. Iqbal, 556
16 U.S. ___, 129 S. Ct. 1937, 1949 (2009). "The
17 plausibility standard is not akin to a 'probability
18 requirement,' but it asks for more than a sheer
19 possibility that a defendant has acted unlawfully. Where
20 a complaint pleads facts that are 'merely consistent
21 with' a defendant's liability, it stops short of the line
22 between possibility and plausibility of 'entitlement to
23 relief.'" Id. (citations and internal quotations
24 omitted).

1 must 'show that the facts alleged present the court with
2 a 'case or controversy' in the constitutional sense and
3 that [he] is a proper plaintiff to raise the issues
4 sought to be litigated.'"), citing Linda R.S. v. Richard
5 D., 410 U.S. 614, 616 (1973).

6
7 To satisfy the "case or controversy" requirement, a
8 plaintiff "must demonstrate that he has suffered an
9 'injury in fact'" that a favorable judgment will redress.
10 Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Newdow,
11 542 U.S. at 12, citing Lujan v. Defenders of Wildlife,
12 504 U.S. 555, 560-561 (1992). In other words, a
13 plaintiff must demonstrate: (1) he has suffered an
14 "'injury in fact' -- an invasion of a legally protected
15 interest which is (a) concrete and particularized, and
16 (b) actual or imminent, not conjectural or hypothetical";
17 (2) there is a causal connection between the injury and
18 the conduct complained of -- that is, the injury is
19 "fairly traceable" to the challenged action of the
20 defendant, and not the result of the independent action
21 of some third party not before the court; and (3) it is
22 "likely," as opposed to merely "speculative," that the
23 injury will be redressed by a favorable judicial
24 decision. Lujan, 504 U.S. at 560-61 (footnote,
25 citations, and quotation marks omitted).

1 The party invoking federal jurisdiction bears the
2 burden of establishing the elements of standing. Lujan,
3 504 U.S. at 561, citing FW/PBS, Inc. v. Dallas, 493 U.S.
4 215, 231 (1990); Warth, 422 U.S. at 508. As the three
5 elements of standing "are not mere pleading requirements
6 but rather an indispensable part of the plaintiff's case,
7 each element must be supported in the same way as any
8 other matter on which the plaintiff bears the burden of
9 proof, *i.e.*, with the manner and degree of evidence
10 required at the successive stages in litigation." Lujan,
11 504 U.S. at 561; Lujan v. Nat'l Wildlife Fed'n, 497 U.S.
12 871, 883-89 (1990); Gladstone Realtors v. Village of
13 Bellwood, 441 U.S. 91, 114-15 & n.31 (1979); Simon v. E.
14 Kentucky Welfare Rights Org., 426 U.S. 26, 45 & n.25
15 (1917); Warth, 422 U.S. at 527 & n.6). "At the pleading
16 stage, general factual allegations of injury resulting
17 from the defendant's conduct may suffice" Id.,
18 citing Nat'l Wildlife Fed'n, 497 U.S. at 889.

19
20 Plaintiffs must satisfy Article III standing
21 requirements to assert each of their claims in federal
22 court. As Plaintiffs' claims all are founded upon the
23 same alleged injuries, the Court's analysis applies to
24 each of them. Plaintiffs fail to establish standing
25 because they have not pled an injury in fact and have not
26 shown how their alleged injuries are "fairly traceable"
27 to Defendants' alleged actions.

28

1 **A. Injury in Fact**

2 Defendants first focus on whether Plaintiffs have
3 suffered a "concrete and particularized, and actual or
4 imminent" injury necessary to meet the first element of
5 Article III standing. Lujan, 504 U.S. at 560-61. To
6 satisfy the "injury in fact" requirement, "[t]he
7 plaintiff must show that he has sustained or is
8 immediately in danger of sustaining some direct injury as
9 a result of the [defendant's] conduct and the injury or
10 threat of injury must be both real and immediate, not
11 conjectural or hypothetical." City of Los Angeles v.
12 Lyons, 461 U.S. 95, 101-02 (1983) (citations omitted);
13 Lujan, 504 U.S. at 560 ("[By injury in fact we mean] an
14 invasion of a legally protected interest which is (a)
15 concrete and particularized, . . . and (b) actual or
16 imminent, not 'conjectural' or 'hypothetical'.")
17

18 As noted above, Plaintiffs allege they were injured
19 by (1) paying "inflated" purchase prices for their houses
20 as a result of the "buying frenzy" created because
21 Defendants sold houses to "unqualified" buyers
22 ("overpayment theory") (FAC ¶¶ 23, 37), and (2) suffering
23 a reduction in the value of their properties caused by
24 Defendants' wrongful acts and omissions ("reduced-value
25 theory") (FAC ¶¶ 32, 34). These alleged harms fall short
26 of a concrete, particular, and actual injury.
27
28

1 **1. Reduced-Value Theory**

2 The Court first considers Plaintiffs' reduced-value
3 theory. Plaintiffs still own their houses, so their
4 assertions of loss are conjectural. Any loss (or gain)
5 -- presumably measured against the initial purchase price
6 -- cannot be ascertained, nor measured, unless and until
7 the owner sells the house. See Phillips v. Frank, 295
8 F.2d 629, 632 (9th Cir. 1961) (recognizing that a gain or
9 loss in real property cases is determined at the time of
10 sale).

11
12 Moreover, the cause of any such loss cannot be
13 determined until that time as well. In other words,
14 Plaintiffs have alleged only harm which, rather than
15 being specific and concrete, is general and tied so
16 closely to pervasive economic conditions and harms, that
17 it does not suffice as an allegation of direct injury.
18 See First Nationwide Bank v. Gelt Funding Corp., 27 F.3d
19 763, 770 (2d Cir. 1994) (recognizing that a number of
20 variables can affect real estate values).

21
22 Other courts have reached the same conclusion when
23 faced with nearly identical allegations. See Kaing v.
24 Pulte Homes, Inc., No. 09-5057, 2010 WL 625365, at *5-6
25 (N.D. Cal. Feb. 18, 2010); Tingley v. Beazer Homes Corp.,
26 No. 07-176, 2008 WL 1902108, at *5, n.3 (W.D.N.C. April
27 25, 2008) ("harm is only realized if Plaintiffs sell
28

1 their home."); Green v. Beazer Homes Corp., No. 07-1098,
2 2007 WL 2688612, at *3 (D.S.C. Sept. 10, 2007)
3 (dismissing the action because "Plaintiff does not . . .
4 suggest that she or any of her other similarly 'injured'
5 neighbors have realized this decrease in value (e.g., as
6 a result of sale of the home).").

7
8 In Kaing, the district court found that a plaintiff
9 in a putative class action against defendant homebuilders
10 lacked standing to assert a theory "that she ha[d] been
11 injured because [the homebuilders'] lending practices
12 caused widespread foreclosures in her neighborhood,
13 [which had] driven down the value of her house." 2010 WL
14 625365, at *5. There, the plaintiff alleged that the
15 defendants "marketed the neighborhoods as stable and
16 desirable neighborhoods, while becoming even more
17 aggressive in selling homes to unqualified and high-
18 foreclosure-risk buyers" Id. at *2. The
19 plaintiff alleged that high foreclosure rates in her
20 neighborhood decreased the value of her house by over
21 50%. Id.

22
23 Furthermore, the Kaing defendant homebuilders'
24 misconduct also allegedly "result[ed] in abandoned
25 houses; multiple families living in one home; transient
26 neighbors with no long-term ties to the neighborhood;
27 unfinished yards and unkempt yards; and, in some cases,
28

1 increased crime." Id. at *5. There, as here, the
2 plaintiff still owned her residence when she brought the
3 action. Id. at *1-2. Also like the Plaintiffs here, the
4 Kaing plaintiff alleged she was harmed by the homebuilder
5 defendants' failure to provide her with a disclosure that
6 "Defendants had sold houses, and would sell houses in the
7 future, to unqualified and high-foreclosure-risk buyers."
8 Id. at *2.

9
10 Distinguishing "general economic harms" from the harm
11 in cases where a plaintiff's injury arose from a physical
12 change to the neighborhood's environment, the Kaing court
13 noted, "[A] decline in value that is tied to a purely
14 economic change to a neighborhood is much more difficult
15 to characterize as 'concrete and particularized, and
16 actual or imminent.' Such economic conditions are likely
17 to change with the broader economy, and any decline in
18 housing value can potentially evaporate before Plaintiff
19 has suffered a concrete injury, even in the absence of
20 redress from the courts." Id. at *5, citing Lujan, 504
21 U.S. at 560-61. As the plaintiff had not sold, or even
22 attempted to sell, her house under the changed economic
23 conditions, the court concluded, "[I]t is not clear that
24 the diminished value of her house is cognizable as an
25 'injury in fact.'" Id.

1 In reaching its conclusion, the Kaing court relied on
2 two other cases arising under similar circumstances --
3 Tingley and Green. In both cases, the plaintiffs filed
4 putative class actions against defendant homebuilders,
5 claiming the defendants targeted low-income purchasers,
6 which resulted in high rates of foreclosure in
7 plaintiffs' neighborhoods and consequently decreased the
8 value of the plaintiffs' residences. See Tingley, 2008
9 WL 1902108, at *1-2; Green, 2007 WL 2688612, at *2.

10
11 Although the Tingley court premised its holding on
12 lack of causation rather than injury in fact, the court
13 noted, "Since the reduced value about which Plaintiffs
14 complain would have resulted from an economic glut of
15 supply, then such harm is only realized if Plaintiffs
16 sell their home during such glut. If Plaintiffs chose to
17 remain in their home until more favorable economic
18 conditions arrive, then they will have realized no loss
19 at all." Tingley, 2008 WL 1902108, at *5, n.3.

20
21 The Green court adopted similar reasoning, holding
22 that although the plaintiff alleged an injury in the form
23 of a generalized loss in the potential market value of
24 her house due to excessive foreclosures on other houses
25 in her neighborhood, she did not "suggest that she or any
26 of her other similarly 'injured' neighbors [had] realized
27 this decrease in value (e.g., as a result of sale of the
28

1 home)." Green, 2007 WL 2688612, at *3. The court thus
2 concluded that the plaintiff's injury was neither
3 concrete nor particularized. Furthermore, it reasoned,
4 "the alleged cause of the decreased value (excessive
5 foreclosures) is of a type which would not necessarily
6 have a long term impact on home prices. This strongly
7 suggests that the injury is conjectural and speculative,
8 and not actual or imminent." Id., citing Lujan, 504 U.S.
9 at 560-61.

10
11 Here, Plaintiffs have not sold their houses at a loss
12 or suffered any actual loss arising from the harms they
13 allege in the FAC. (See FAC ¶¶ 38, 39, 40.) Thus, like
14 the plaintiffs in Kaing, Tingley, and Green, Plaintiffs
15 have not "realized [a] decrease in value." Kaing, 2010
16 WL 625365, at *5; Tingley, 2008 WL 1902108, at *5 n.3;
17 Green, 2007 WL 2688612, at *3. Furthermore, the injury
18 is speculative, rather than actual or imminent, because
19 economic conditions affecting the value of Plaintiffs'
20 houses are subject to change with broader economic
21 conditions. Green, 2007 WL 2688612, at *3; Tingley, 2008
22 WL 1902108, at *4 ("it is just as plausible that a
23 positive change in the unemployment rate, the housing
24 market, the mortgage interest rates or other economic
25 factors could cause an increase in [Plaintiffs'] property
26 value[s].") (emphasis added). Thus, the alleged decline
27 in value that Plaintiffs claim to have suffered may
28

1 vanish before Plaintiffs suffer a concrete injury. See
2 Kaing, 2010 WL 625365, citing Lujan, 504 U.S. at 560-61.

3
4 To bolster their claim and distinguish the facts here
5 from Tingley and Green, Plaintiffs allege they suffered
6 additional injuries: "[U]nstable neighborhoods, multiple
7 families living in one home, transient neighbors with no
8 long-term ties to the neighborhood, unfinished and
9 unkempt yards, and in some cases, increased crime." (See
10 Stephens Opp'n at 13.) This attempt fails, however,
11 because Plaintiffs' FAC contains nothing more than
12 speculation to link these harms to Defendants' conduct or
13 omissions. See Kaing, 2010 WL 625365, at *5-6 (holding
14 that plaintiffs claiming similar injuries failed to
15 allege a cognizable injury in fact). See Section
16 III(A)2, below.

17
18 Plaintiffs also attempt to distinguish this case from
19 Tingley and Green by arguing that the plaintiffs in those
20 cases did not allege a failure to disclose or that the
21 prices of their houses were "artificially inflated" as a
22 result of the defendant homebuilders' conduct. (Stephens
23 Opp'n at 13.) The existence of an additional allegation
24 of harm, however, does not salvage the FAC.

1 Moreover, Plaintiffs fail to distinguish their case
2 from Kaing, in which the plaintiff claimed failure to
3 disclose and also alleged she was overcharged. 2010 WL
4 625365, at *2. Plaintiffs fail to persuade the Court
5 that these factors are sufficient to transform their
6 speculative harms into a cognizable injury in fact.

7
8 Plaintiffs rely on Friends of the Earth, Inc. v.
9 Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000), to
10 argue they have pled a cognizable injury in fact.
11 (Stephens Opp'n at 9-10.) There, the Supreme Court
12 considered the ability to sue for environmental harm, and
13 held that a citizen adequately pled an injury in fact by
14 alleging the defendant's pollution interfered with
15 recreational opportunities. 528 U.S. at 183. Plaintiffs
16 point to language in the opinion referring to an alleged
17 diminution in the value of the litigants' property. Id.
18 at 182-83. A diminution in value that is tied to a
19 physical change in the neighborhood's environment, such
20 as pollution in the case of Friends of the Earth, is
21 better characterized as concrete and particularized, and
22 actual or imminent, than a purely economic change in a
23 neighborhood. Lujan, 504 U.S. at 560-61.

24
25 When faced with similar facts, the district court in
26 Kaing found the plaintiff had failed to plead actual
27 injury. 2010 WL 625365, at *5 ("Compared to the
28

1 diminution in value that is tied to a physical change to
2 the neighborhood's environment, such as pollution . . . a
3 decline in value that is tied to a purely economic change
4 to a neighborhood is much more difficult to characterize
5 as concrete and particularized, and actual or
6 imminent."). The Kaing court noted a key difference
7 between environmental harm tied to physical damage and
8 economic harm: "[A diminution in value arising from
9 economic harm] can potentially evaporate before Plaintiff
10 has suffered a concrete injury, even in the absence of
11 redress from the courts." Id. While environmental
12 damage caused by pollution does not redress itself, the
13 complex economic factors that affected the value of
14 Plaintiffs' residences can improve. See Tingley, 2008 WL
15 1902108, at *4 n.3.

16
17 The capacity for Plaintiffs' alleged injury to
18 fluctuate with changes in the economy, "strongly
19 suggests" that Plaintiffs' alleged injury is "conjectural
20 and speculative, not actual or imminent." Green, 2007 WL
21 2688612, at *3; see Sanner v. Bd. of Trade of City of
22 Chicago, 62 F.3d 918, 924 (7th Cir. 1995) (finding
23 soybean farmers who refrained from selling their crops
24 due to a depressed market price lacked standing to sue
25 under Article III, while those who sold at the depressed
26 price enjoyed standing because "[t]he fact of a sale at
27 an allegedly depressed price establishes discernable
28

1 injury in a manner in which a failure to sell cannot."),
2 citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S.
3 723, 743 (1975).

4
5 Plaintiffs next argue they have suffered an injury in
6 fact because California law permits real estate buyers to
7 sue for rescission and damages when a seller fails to
8 disclose material facts. (Stephens Opp'n at 10-11); see
9 Reed v. King, 145 Cal. App. 2d 261 (1983). This argument
10 fails, however, because it merely states the remedies
11 available to plaintiffs in failure to disclose cases, but
12 does not establish an injury.

13
14 Furthermore, the facts in the cases Plaintiffs cite
15 are distinguishable from the context of this case; the
16 failure to disclose in the former cases recognized a duty
17 to disclose (1) physical defects and legal impediments to
18 use of real property, (Karoutas v. HomeFed Bank, 232 Cal.
19 App. 3d 767, 771 (1991) (finding a duty to disclose where
20 plaintiff's residence had substantial and permanent soil
21 movement that required costly repairs); SanFran Co. v.
22 Rees Blow Pipe Mfg. Co., 168 Cal. App. 2d 191, 205
23 (finding a duty to disclose where a property was missing
24 walls and subject to various building code violations);
25 Graf v. Sumpter, 207 Cal. App. 2d 391, 392-93 (finding a
26 duty to disclose where the land upon which plaintiffs'
27 residence was built was not properly compacted, causing
28

1 cracking and crumbling of the residence); or (2) in cases
2 of extreme stigma, (Reed v. King, 145 Cal. App. 3d 261,
3 267 (1983) (finding a duty to disclose where residence
4 was site of gruesome multiple murders committed on the
5 property, but noting that such circumstances were "highly
6 unusual"))).

7 8 **2. Overpayment Theory**

9 Finally, as to Plaintiffs' overpayment theory, the
10 Court construes these allegations as an attempt to
11 describe Defendants' motives for issuing subprime loans.
12 To the extent, however, that Plaintiffs allege they
13 overpaid as a result of Defendants' efforts to inflate
14 housing demand artificially by offering subprime loans,
15 the Court finds the alleged injury is too speculative to
16 constitute an injury in fact because it is not "concrete
17 or verifiable." See Kaing, 2010 WL 625365, at *3, n.2.
18 Plaintiffs allege that Defendants "market[ed] materials
19 that depicted the community as a stable, family[-]based
20 neighborhood" (FAC ¶¶ 38, 39, 40) and "provided . . .
21 false and misleading standardized representations and
22 advertisements regarding the value of the house sold[,]
23 [t]he sales practice of selling to investors[,], and the
24 desirability of the neighborhood where the house was
25 sold" (FAC ¶ 77). Plaintiffs also allege that Defendants
26 offered subprime loans to "artificially increase[]
27 demand" and thereby increase prices for houses in
28

1 Plaintiffs' neighborhoods. (FAC ¶¶ 23, 24, 33.) As with
2 Plaintiffs' reduced-value theory, the capacity for
3 Plaintiffs' alleged injury to fluctuate with changes in
4 the economy, "strongly suggests" that Plaintiffs' injury
5 is "conjectural and speculative, not actual or imminent."
6 Green, 2007 WL 2688612, at *3.

7
8 Thus, the Court finds that Plaintiffs have failed to
9 articulate an injury in fact that is "concrete and
10 particularized, and actual or imminent." Cf. Lujan, 504
11 U.S. at 560-61.

12
13 **B. Causation**

14 Plaintiffs "face[] a similarly insurmountable problem
15 with respect to the causation element of standing."
16 Kainig, 2010 WL 625365, at *6. Plaintiffs allege they
17 overpaid for their houses and suffered a reduction in the
18 value of their properties caused by Defendants' wrongful
19 acts and omissions. Plaintiffs' injury must be "fairly
20 traceable to the challenged action of the defendant, and
21 not the result of the independent action of some third
22 party not before the court." Lujan, 504 U.S. at 560.
23 "The line of causation between the [alleged] illegal
24 conduct and injury" must not be "too attenuated." Allen
25 v. Wright, 468 U.S. 737, 752 (1984).

1 **1. Reduced-Value Theory**

2 Plaintiffs' reduced-value injury is not "fairly
3 traceable" to the challenged action of Defendants.
4 First, any loss in value Plaintiffs have suffered has
5 resulted not just from the actions of Defendants, but
6 also from the independent actions of others, e.g.
7 homeowners in Plaintiffs' neighborhoods who defaulted on
8 their mortgages and third-party mortgage companies that
9 foreclosed on houses in Plaintiffs' neighborhoods.
10 Plaintiffs' theory is premised upon a chain of causation
11 that is affected by general economic factors. These
12 general factors can have unpredictable effects, such as
13 collapse of financial institutions, changes in the credit
14 market, and rising unemployment, which by themselves or
15 in combination affect the housing market. In other
16 words, any injuries suffered by Plaintiffs necessarily
17 depend upon a causal chain that includes numerous
18 independent forces and individual decisions of "some
19 third part[ies] not before the court." Lujan, 504 U.S.
20 at 560-61.

21
22 Plaintiffs allege that Defendants (1) "marketed the
23 house and neighborhood as stable and desirable" (FAC ¶¶
24 22, 28, 31, 38-40, 45, 89); (2) sold houses to
25 "unqualified and high-foreclosure-risk buyers" and
26 assisted them in purchasing or financing their houses
27 (FAC ¶¶ 23, 26); (3) sold houses to "investors that were
28

1 not owner[-] occupiers of the houses," (FAC ¶¶ 48, 50);
2 and (4) did not disclose this information to Plaintiffs
3 (FAC ¶ 32, 35, 38-40, 49, 70). Plaintiffs conclude that
4 as a result of Defendants' conduct, the "neighborhoods
5 where Plaintiffs live have had a number of foreclosures,"
6 which "have resulted in substantial loss of value to the
7 surrounding homes." (FAC ¶ 52.)

8
9 As Defendants point out, an examination of the causal
10 chain reveals the speculative nature of Plaintiffs'
11 injuries. (Lennar Mot. at 9.) Plaintiffs allege that
12 Defendants sold houses in Plaintiffs' neighborhoods to
13 "unqualified" buyers. Plaintiffs define as "unqualified"
14 those buyers who purchased their houses with less than a
15 20% down payment. Later, some of these unqualified
16 buyers defaulted on their mortgage loans. Eventually,
17 third-party mortgage companies foreclosed on those
18 houses; Defendants did not initiate these foreclosure
19 proceedings. The loss of houses due to foreclosure --
20 along with other factors -- eventually contributed to a
21 decrease in the value of Plaintiffs' houses. (See
22 Stephens Opp'n at 9.) When examining the chain of events
23 Plaintiffs allege, it is apparent that the Plaintiffs'
24 alleged injuries necessarily depend upon a causal chain
25 that includes numerous independent forces and individual
26 decisions of "some third part[ies] not before the court."
27 Lujan, 504 U.S. at 560-61.

28

1 Other courts have reached the same conclusion when
2 faced with nearly identical allegations. See Kaing, 2010
3 WL 625365, at *6; Tingley, 2008 WL 1902108, at *4; Green,
4 2007 WL 2688612, at *3. As the Kaing and Tingley courts
5 noted, a causal chain cannot be found or even inferred
6 from such allegations because each link in the chain may
7 be caused by factors other than Defendants' conduct.
8 Kaing, 2010 WL 625365, at *6; Tingley, 2008 WL 1902108,
9 at *4. For example, the other owners may have defaulted
10 on their mortgages as a result of "other factors, such as
11 unemployment, health problems, a general weakening of the
12 economy, or other financial conditions." Tingley, 2008
13 WL 1902108, at *4. Furthermore, there are "intervening
14 decisions by the mortgage assignees to foreclose the
15 defaulted mortgages rather than to restructure the loans,
16 which may have been done for reasons totally apart from
17 the alleged fraud." Id.

18
19 The allegations that the depreciation of Plaintiffs'
20 property was caused by the foreclosures in their
21 neighborhood, "rather than as a result of a myriad of
22 other factors, such as rising unemployment in the region,
23 changes in the housing market, or other economic
24 conditions," falls short of the standard required to
25 plead causation. Kaing, 2010 WL 625365, at *6. Although
26 foreclosures can have an adverse impact on property
27 values, supply and demand are affected simultaneously by
28

1 a number of market factors. See Tingley, 2008 WL
2 1902108, at *4. Any combination of these factors may
3 have caused a reduction in Plaintiffs' property values.
4 See id. Even assuming that the value of Plaintiffs'
5 property was affected adversely by foreclosures in their
6 neighborhoods, the connection "remains too tenuous to
7 provide standing." Id.

8
9 The additional injuries Plaintiffs allege in the FAC
10 -- "unstable neighborhoods, multiple families living in
11 one home, transient neighbors with no long-term ties to
12 the neighborhood, unfinished and unkempt yards, and in
13 some cases, increased crime" -- are not "fairly
14 traceable" to the challenged action of Defendants.
15 Viewing the allegations in FAC in the light most
16 favorable to Plaintiffs, Plaintiffs fail to plead facts
17 sufficient "to raise a right to relief above the
18 speculative level." Bell Atlantic, 550 U.S. at 555. The
19 FAC contains nothing more than speculation to link these
20 harms to Defendants' conduct or omissions. See Kaing,
21 2010 WL 625365, at *5-6 (holding that plaintiffs claiming
22 similar injuries failed to allege causation sufficient to
23 survive a motion to dismiss).

24
25 The fragility of the connection between Defendants'
26 alleged conduct and the decreased value of Plaintiffs'
27 houses is illuminated "with each additional link in the
28

1 chain where the choices of others have an impact and make
2 other scenarios at least as plausible as the one advanced
3 by . . . Plaintiffs." Id. Put into concrete terms,
4 because Plaintiffs still own their properties, a positive
5 change in the unemployment rate, housing market, mortgage
6 interest rates, or other economic factors could cause
7 Plaintiffs' property values to increase, thus decreasing
8 or obviating their alleged losses. Again, other courts
9 reached the same conclusion. Tingley, 2008 WL 1902108,
10 at *4; Green, 2007 WL 2688612, at *3.

11

12 **2. Overpayment Theory**

13 Turning to Plaintiffs' overpayment theory, the Court
14 construes these allegations as an attempt to describe
15 Defendants' motives for issuing subprime loans. To the
16 extent, however, that Plaintiffs allege they overpaid for
17 their houses as a result of Defendants' efforts to
18 inflate housing demand artificially by offering subprime
19 loans, the causal connection between the alleged
20 overpayment and Defendants' "scheme" depends upon
21 numerous independent factors and third parties not before
22 the court. See Kaing, 2010 WL 625365, at *6.

23
24 The third parties include, for example, the alleged
25 "unqualified" and "investment" buyers to whom Plaintiff
26 also indirectly assign blame for the decrease in their
27 property values. These third parties acted

28

1 independently, e.g., to default on loan payments, to
2 choose their tenants, or to maintain their properties,
3 which in turn directly affect losses Plaintiffs allegedly
4 suffered, thus making it impossible to trace those losses
5 to Defendants' alleged misconduct.

6
7 Similarly, the "housing bubble," or inflation of
8 housing prices, was a nationwide phenomenon, traceable to
9 variables independent of Defendants' alleged scheme, such
10 as lax regulatory enforcement, rates of unemployment,
11 credit market developments, and general economic growth.
12 As with Plaintiffs' reduced-value theory, it cannot be
13 said that the inflated purchase prices Plaintiffs
14 allegedly paid are fairly traceable to Defendants'
15 alleged "scheme."

16
17 Thus, taking Plaintiffs' allegations as true, as the
18 Court must for these purposes, Plaintiffs' harm is not
19 "fairly traceable" to Defendants' alleged conduct.
20 Plaintiffs, therefore, do not have standing to sue for
21 paying an "inflated" purchase price for their houses or
22 for a subsequent reduction in value of their houses.
23 Hence, the Court lacks subject matter jurisdiction over
24
25
26
27
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1 this action and accordingly DISMISSES the FAC,⁴ with
2 prejudice.

3

4

IV. CONCLUSION

5 For the foregoing reasons, the Court GRANTS
6 Defendants' Motion to Dismiss. As the Court finds that
7 Plaintiffs would be unable to amend their pleadings to
8 correct the deficiencies related to constitutional
9 standing, it dismisses the First Amended Complaint with
10 prejudice.

11

12 The Court DENIES Defendants' Motion to Strike as
13 moot.

14

15 **IT IS SO ORDERED.**

16

17

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Dated: March 31, 2010

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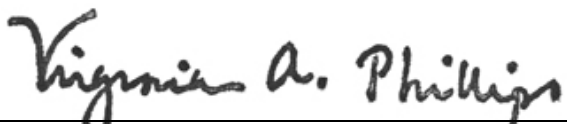
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VIRGINIA A. PHILLIPS
United States District Judge

26

27

28

⁴ As the Court finds Plaintiffs lack standing to assert their claims, it does not have jurisdiction over this matter. The Court, accordingly, does not reach Plaintiffs' and Defendants' arguments regarding Rule 9 and 12(b)(6) as to each claim.