UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RICHARD A. CANATELLA,

Plaintiff,

v.

REVERSE MORTGAGE SOLUTIONS INC., ET AL.,

Defendants.

Case No. 13-cv-05937-YGR

ORDER (1) GRANTING HUD'S MOTION TO DISMISS AND (2) GRANTING IN PART RMS'S MOTION TO DISMISS WITH LEAVE TO AMEND

Re: Dkt. Nos. 25 & 28

Plaintiff Richard Canatella ("Canatella") filed his amended complaint, individually and as trustee of the Canatella Family Trust, against Reverse Mortgage Solutions, Inc. ("RMS") and Shaun Donovan, Secretary of the United States Department of Housing and Urban Development ("HUD") on March 10, 2014, asserting counts for: (1) declaratory judgment, against both defendants; (2) violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq. ("ECOA"), against RMS; and (3) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. ("UCL"), against RMS. (Dkt. No. 22 ("AC") ¶¶ 66-91.) These allegations stem from RMS's refusal to provide plaintiff with a reverse mortgage and HUD's purportedly negligent supervision of RMS.

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), defendants filed separate motions to dismiss plaintiff's amended complaint on the grounds that: (1) the Court lacks subject matter jurisdiction; and (2) the amended complaint fails to state a claim upon which relief can be granted. (Dkt. Nos. 25 ("RMS Mot."), 28 ("HUD Mot.").) Canatella opposes both motions. (Dkt. Nos. 27 ("RMS Oppo."), 31 ("HUD Oppo.").)

Having carefully considered the papers submitted, the amended complaint,[1] and the arguments of counsel, the Court hereby **GRANTS** HUD's Motion to Dismiss and **GRANTS IN PART**

[1] Plaintiff filed two requests that the Court take judicial notice of his amended complaint. (Dkt. Nos. 27, 32.) Those requests are **DENIED** as unnecessary. *See, e.g.*, *Martinez v. Blanas*, Case No. 2:06-CV-0088 FCD, 2011 WL 864956, at *1 n.1 (E.D. Cal. Mar. 10, 2011).

RMS's Motion to Dismiss **WITH LEAVE TO AMEND** as to both defendants.

I. BACKGROUND

The amended complaint is not a model of clarity. At times, it appears to be self-contradicting. It also contains substantial legal argument, citations, and conclusions—many of which are spurious—intertwined with its factual allegations. In light of these circumstances, the Court gleans the essential facts relative to these motions as follows.[2]

Canatella's principal residence is 357 Vincente Street, San Francisco, CA ("357 Vincente"). (AC ¶ 58.) The property is worth approximately $1.7 million. (*Id.* ¶ 54.) He holds the property in fee simple as trustee of an irrevocable trust, the Richard A. Canatella Family Trust, dated June 1, 1978 (the "Trust"),[3] on behalf of its beneficiaries, Canatella's "estranged spouse" and his adult son. (*Id.* ¶¶ 25, 55-58.) When he placed 357 Vincente into the Trust, Canatella reserved for himself a life estate in the residence. (*Id.* ¶ 62.) A life estate has "questionable value . . . because it is 'subject to complete defeasance at an unknown time.'" (*Id.* ¶ 62.)

This suit arises from plaintiff's unsuccessful attempt to secure a reverse mortgage on 357 Vincente. A reverse mortgage provides a lump sum or periodic payments to a homeowner from a lender. (*Id.* ¶ 51.) In exchange, the lender is able to receive back the amount paid plus interest, often not until some triggering event (e.g., the death of the borrower). (*Id.* ¶ 51.) The loan is secured by a particular property. (*Id.* ¶ 52.) Because reverse mortgages are often not repaid until the death of the borrower, a lender's sole recourse may be to sell the property at that time. (*Id.*) Such loans can present substantial risks to lenders. For instance, if a homeowner lives longer than anticipated, accruing significant interest on the loan that far outpaces the appreciation of the property, the lender will be limited in its recovery. (*Id.*) Therefore, lenders may take advantage of

[2] The factual allegations in the amended complaint are accepted as true for purposes of considering this motion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) ("In a facial attack [on subject matter jurisdiction], the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.").

[3] Plaintiff did not file a copy of the Trust paperwork along with his amended complaint, but cites certain portions thereof and reaches legal conclusions about the nature of the Trust.

the HUD-insured Home Equity Conversion Mortgage ("HECM") program. (*Id*.) If a loan qualifies under the program, then HUD provides mortgage insurance to the lender to guard against possible loss. (*Id*.)

In or around August 2013, after seeing an online advertisement,[4] Canatella approached RMS seeking a reverse mortgage on 357 Vincente. (*Id*. ¶¶ 1, 50.) Plaintiff contacted Homa Rassouli, an RMS reverse mortgage specialist, and thereafter provided RMS with some of his personal and financial information. (*Id*. ¶ 53.) At Rassouli's insistence, plaintiff and his "estranged spouse" met with a HUD counselor. (*Id*. ¶¶ 25 & n.20, 53.) Rassouli then referred plaintiff to Therese Burgueno, an RMS reverse mortgage consultant. (*Id*. ¶ 53.) At her request, he turned over copies of the Trust paperwork and the deed to the property in question. (*Id*.)

Plaintiff indicated that he sought the loan in his own name, with no co-borrowers. (*Id*. ¶ 55.) Plaintiff has not alleged that he sought the loan on behalf of the trust, but rather he sought a lump sum payment of approximately $460,000 for his personal use. (*Id*. ¶¶ 34-35, 37-38, 74, 80, 91 ("If plaintiff is unable to raise funds through a HECM loan to either finance his own retirement or continue to maintain and operate his law office to earn a living, plaintiff will be forced to sell the property thereby rendering himself homeless. Under the instant trust all proceeds of sale would go to the beneficiaries with nothing left for plaintiff to relocate or even purchase another property!").) Thus, he apparently sought to extract equity from 347 Vincente by obtaining a loan for a substantial sum secured by the property that is held in trust for the benefit of others, and in which he personally retains only a life estate.

After forwarding plaintiff's loan request to legal counsel, Burgueno informed plaintiff that RMS would not process his application for a reverse mortgage. (*Id*. ¶ 50.) Burgueno stated that plaintiff was ineligible for a HECM loan because title was held in irrevocable trust and plaintiff, as trustee, lacked a beneficial interest in the property. (*Id*. ¶ 57.)

Plaintiff filed the instant lawsuit on December 23, 2013. (Dkt. No. 1.) After defendants

[4] Plaintiff alleges consumer fraud by RMS via false advertisement regarding the ease of qualifying for HECM loans. (AC ¶ 21.)

filed initial motions to dismiss, plaintiff rendered them moot by filing his amended complaint. Plaintiff claims he was eligible for a HECM loan and that RMS's refusal to consider his application was the result of age discrimination. (AC ¶ 16, 19-21, 82.) He also claims HUD is negligently supervising RMS by allowing it to impose its own pre-conditions before issuing HECM loans that he asserts are inconsistent with HUD's regulatory framework. (*Id.* ¶ 4, 9, 16, 39, 74.) For instance, "RMS would require plaintiff to convey the property to a revocable (as opposed to an irrevocable trust) though an irrevocable trust is the cornerstone of plaintiff's estate plan primarily for the tax benefits such a plan provides." (*Id.* ¶ 9) In response to these allegations, defendants moved to dismiss on numerous grounds. The Court begins with the Rule 12(b)(1) motion.

II. RULE 12(b)(1)

A motion under Rule 12(b)(1) challenges the grounds for the Court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). Plaintiff invoked this Court's jurisdiction and consequently bears the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376–78 (1994). Because jurisdiction is a threshold question, the Court will address this issue first. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 102 (1998).

Both defendants challenge plaintiff's standing to bring this action and move to dismiss pursuant to Fed. R. Civ. P. (12)(b)(1), arguing plaintiff lacks standing to bring this case because he has suffered no redressable injury as a result of their conduct. HUD also asserts sovereign immunity. The Court will address each argument in turn.

A. Standing

As a threshold inquiry to the adjudication of any lawsuit, a plaintiff must establish standing under Article III of the U.S. Constitution so that the Court has subject matter jurisdiction. To establish Article III standing, a plaintiff must satisfy three elements: (1) "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation—"there must be a causal connection between the injury and the conduct complained of"; and (3) redressability—"it must be likely, as

opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks, citations, and footnote omitted). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. 561. As to each claim, defendants argue plaintiff has failed to satisfy all three necessary prongs to establish standing: injury in fact, causation, and redressability.

Plaintiff alleges RMS is guilty of false advertising and certain statutory procedural violations in connection with his UCL claim. He also alleges he was wrongfully denied a mortgage as a result of age discrimination by RMS. Wrongful denial of a mortgage application is a cognizable injury in fact. The questions remain whether such injury was caused by, or is redressable by, either defendant.

i. Standing as to HUD

Plaintiff asserts only Count I (for declaratory judgment) against HUD. The Court finds that plaintiff's purported injury could not have been caused by,[5] and is not redressable by, HUD. The Court understands this count to seek declaratory judgment according to the theory that HUD negligently supervised RMS, thereby failing to protect plaintiff from a purportedly unlawful denial of his loan application, and to request as relief an order directing HUD to require RMS to issue a HECM loan to plaintiff. Plaintiff, however, does not allege that HUD had any involvement in RMS's decision in regards to his specific application. Moreover, he has failed to put forth any authority demonstrating HUD has both (1) an affirmative duty to supervise lenders' decisions as to

[5] Plaintiff argues that "the causation issue is not appropriate for consideration on HUD's motion to dismiss" (HUD Oppo. at 7), but the case he cites in support of that proposition merely holds that "*conflicting* arguments regarding causation could not be decided [upon a] motion to dismiss." *See Smith v. United Residential Servs. & Real Estate, Inc.*, 837 F. Supp. 2d 818, 825 (N.D. Ill. 2011) (emphasis added). Here, HUD does not put forth a conflicting argument regarding causation. Instead, HUD argues that even accepting as true plaintiff's factual allegations, he has failed as a matter of law to establish a causal connection between HUD's conduct and plaintiff's purported injury. The Court agrees. *See Pritikin v. Dep't of Energy*, 254 F.3d 791, 801 (9th Cir. 2001) (affirming dismissal where plaintiff "has not shown that her injury was 'fairly traceable' to [defendant's] actions or that the relief she seeks will remedy that injury").

specific HECM loan applications and (2) the ability to order RMS to offer a reverse mortgage to plaintiff. HUD presents authority that suggests it has no such supervisory right or obligation under any of the statutory regimes raised by plaintiff. *See, e.g.*, 15 U.S.C. § 1691c (regarding the ECOA); *Marinoff v. U.S. Dep't of Housing & Urban Dev.*, 892 F. Supp. 493, 496 (S.D.N.Y. 1995) (regarding the Fair Housing Act). Because the only claim alleged against HUD is one for declaratory relief, essentially requiring HUD to force RMS to issue a mortgage to plaintiff, and plaintiff has not demonstrated that HUD has that authority, plaintiff has no standing to assert his claims against HUD based on the allegations in the operative complaint.

Even if plaintiff did have standing to assert his claims against HUD, the Court would decline to exercise its jurisdiction under the Declaratory Judgment Act as HUD has not yet taken any direct action in connection with plaintiff. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Because the exercise of jurisdiction under the Act is not compulsory, even when a district court clearly has jurisdiction under the Declaratory Judgment Act, it may decline, in its discretion, to exercise that jurisdiction if it determines that declaratory relief is not appropriate. *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942). The Court finds it would be a waste of judicial resources to address the question of whether HUD is obligated to insure, under the HECM program, a loan to plaintiff unless and until HUD refuses to do so. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) ("In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.").

ii. Standing as to RMS

The Court similarly finds that the plaintiff lacks standing under Count I (for declaratory judgment) as to RMS. Plaintiff filed this claim for declaratory judgment to adjudicate whether RMS was required to provide him with a HECM loan and whether HUD negligently supervised RMS in failing to prevent his application from being rejected. The Court finds that plaintiff's

theory seeking declaratory judgment, as presented in the amended complaint, appears to be based entirely upon the unsupported and apparently flawed premise that RMS is obligated to grant a reverse mortgage to any applicant who qualifies under HECM guidelines. He has therefore failed to establish causation or redressability under Count I. Consequently, the Court finds that plaintiff has no standing to assert Count I against either defendant. However, plaintiff also asserts Counts II (ECOA) and III (UCL) against RMS.

As to RMS, plaintiff alleges:

> RMS is discriminating against plaintiff on the basis of age by (1) treating plaintiff less favorably than other applicants; (2) refusing to process a reverse mortgage or HECM loan application for plaintiff a qualified applicant, and (3) demanding plaintiff's fulfillment of unlawful preconditions prior to underwriting consideration (i.e., RMS would require plaintiff to convey the property to a revocable (as opposed to an irrevocable trust) [*sic*] though an irrevocable trust cannot be amended or revoked and an irrevocable trust is the cornerstone of plaintiff's estate plan primarily for the estate tax benefits such a plan provides.

(AC ¶ 16.) Without reaching the merits of plaintiff's claim, the Court finds that plaintiff has sufficiently alleged that RMS caused the type of injury contemplated by the ECOA—e.g., denial of a mortgage based on age discrimination. This type of injury is redressable by the lender. Therefore, plaintiff has standing to assert Count II. Because plaintiffs' UCL claim is premised upon the same general theory, he also has standing to assert Count III.

B. Sovereign Immunity

HUD asserts sovereign immunity. Because the Court has determined that plaintiff lacks standing to assert his claim against HUD, it is not necessary to address the issue of sovereign immunity at this time. Nevertheless, the Court will address plaintiff's sovereign immunity waiver arguments in order to provide guidance regarding any future amendments to the complaint.

i. Legal Framework

Whether the United States has waived its sovereign immunity is a question of the Court's subject matter jurisdiction. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). The plaintiff therefore bears the burden of establishing a waiver of sovereign immunity. *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

Absent waiver, sovereign immunity shields the federal government and its agencies and employees from suit. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). One such statute is the Federal Tort Claims Act ("FTCA"), which provides a limited waiver of the government's immunity from tort liability. *See Valdez-Lopez v. Chertoff*, 656 F.3d 851, 855 (9th Cir. 2011) ("The FTCA 'waives the sovereign immunity of the United States for actions in tort' and 'vests the federal district courts with exclusive jurisdiction over suits arising from the negligence of Government employees.'"). Under the FTCA, "[t]he United States shall be liable . . . relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2401(b); *but see id*. § 2680 (providing exceptions to liability, including where an official or agency exercises due care in execution of discretionary functions). First, however, the individual must have presented his claim to the appropriate administrative agency and receive a final adverse determination. *Valdez-Lopez*, 656 F.3d at 855.

Another such statute, the Administrative Procedures Act ("APA") (5 U.S.C. §§ 701-706), confers jurisdiction upon courts to review the claim of "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (entitled "Right of review"). Unless a statute provides an applicable private right of action, courts may only review "final agency action for which there is no other adequate remedy." *Id*. § 704 (entitled "Actions reviewable"); *see Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61-62 (2004).

ii. Analysis

Plaintiff presents theories of sovereign immunity waiver in his complaint. (AC ¶¶ 2-14.) He also puts forth waiver arguments in his opposition brief. (HUD Oppo. at 15-20.) "The underlying conduct for which a waiver of sovereign immunity is sought is HUD's alleged negligent supervision of RMS and its refusal to protect plaintiff from RMS's unlawful application of HUD's regulatory framework." (AC ¶ 12.)

Plaintiff's concedes the FTCA does not apply. (AC ¶ 12.) He focuses his waiver

arguments on (1) the APA (via a violation of the ECOA) and (2) a constitutional right of access to the courts. The Court will address both arguments in turn.

First, plaintiff does not allege that he petitioned HUD for any relief prior to filing this lawsuit, or that HUD took any direct action—let alone "final agency action"—in connection with his mortgage application. Plaintiff appears to concede that there is no "final agency action" in this case and that, therefore, his argument for waiver depends upon a right of action provided for under a different statute. (HUD Oppo. at 15-16.) Plaintiff argues the ECOA provides a private right of action against HUD sufficient to establish waiver of sovereign immunity under the APA. While the United States may be deemed a "creditor" under the ECOA, the facts at issue here do not allege HUD was acting in that manner or directly discriminating against plaintiff. All of plaintiff's allegations of direct discrimination or other substantive violations of the ECOA are targeted solely at RMS. Plaintiff's only theory of liability as to HUD is that the agency negligently supervised RMS. There is no cause of action for negligent supervision by HUD provided for under the ECOA. Indeed, the case plaintiff cites in support of his contention is entirely inapposite; it involved purported lending discrimination by a federal agency, the Farmers Home Administration. *See Moore v. U.S. Dep't of Agric. on Behalf of Farmers Home Admin.*, 55 F.3d 991, 992 (5th Cir. 1995). Therefore, plaintiff has failed to establish waiver of sovereign immunity on this basis.

Second, plaintiff argues waiver via a constitutional right of access to the courts. "But, from time immemorial, that access has been subject to another foundational principle of our judicial system, *to wit*, that '[t]he Federal Government cannot be sued without its consent.'" *Petro-Hunt, L.L.C. v. United States*, 105 Fed. Cl. 37, 46 (2013) (quoting *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009)) (finding "Congress has broad discretion not only in generally defining the jurisdiction of the lower federal courts, but, particularly, in deciding the conditions under which the sovereign immunity of the United States will be waived"). Plaintiff also acknowledges that the Supreme Court has described the right as "'ancillary to the underlying claim.'" (AC ¶ 7 (quoting *Christopher v. Harbury*, 536 U.S. 403, 403 (2002)).) Without a valid claim, "a plaintiff cannot have suffered injury by being shut out of court." *Christopher*, 536 U.S.

415. As discussed above, plaintiff has asserted no valid underlying cause of action against HUD. Thus, he has failed to establish sovereign immunity waiver and cannot maintain his claim against HUD as presently alleged based on a constitutional right of access argument.

III. RULE 12(b)(6)

Both defendants also move to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), asserting it fails to state a claim upon which relief can be granted.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). All allegations of material fact are taken as true. *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011). To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

Pursuant to Rule 12(b)(6), a complaint may be dismissed as to a particular defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleadings. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265 (1986); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). The complaint must plead "enough facts to state a claim [for] relief that is plausible on its face." *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Thus, "for a complaint to survive a motion to dismiss, the non-conclusory

'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

A. Count I

Although the Court has found that plaintiff lacks standing to assert Count I against HUD or RMS, and therefore need not reach the 12(b)(6) motion as to this count, it nevertheless does so, finding 12(b)(6) to be an appropriate alternative basis for dismissing Count I.

In Count I, plaintiff seeks declaratory judgment against RMS, asserting that he is an eligible borrower under the HECM program and, therefore, that RMS's denial of his loan application was improper. (AC ¶¶ 66-74.) He also seeks declaratory relief against HUD premised upon a theory of negligent supervision by the agency. Count I therefore appears premised on two theories: (1) that RMS had an obligation to offer plaintiff a HECM loan so long as plaintiff satisfied the HECM guidelines and (2) that HUD had a duty to supervise RMS in connection with plaintiff's loan application. The Court will address each in turn.

As to RMS, plaintiff has not put forth any authority suggesting a private lender, such as RMS, has an obligation to grant a loan to every applicant who qualifies under the HECM guidelines. To the contrary, HUD guidelines appear to provide substantial discretion to lenders in determining whether a particular applicant is qualified, such as HUD 4235.1, 4-5(A)(4), which provides that "[t]he lender must be satisfied that the trust is valid and enforceable."

As to HUD, for the reasons discussed above, plaintiff has also failed to state a cognizable theory for relief. Moreover, plaintiff's conclusory statements that he was a "qualified applicant" are insufficient to establish whether his application would have qualified under the HECM program. Indeed, HUD guidelines provide that all vested (as opposed to contingent) beneficiaries must be eligible HECM borrowers at the time of loan origination. HUD 4235.1, 4-5(A)(1). Based on his pleadings, plaintiff's adult son was apparently a vested beneficiary in the trust. (AC ¶¶ 55 (alleging plaintiff's spouse and adult son are beneficiaries of the trust), 62 ("At the time [it was established] the entire equitable estate transferred to the beneficiaries of the trust.").) But plaintiff has not alleged that his son meets the age requirements in order to qualify for the HECM program.

(*Id*. ¶ 1 n.3 (the HECM program insures qualifying loans to borrowers over the age of 62).)

B. Count II

In Count II, plaintiff alleges various violations of the ECOA. (AC ¶¶ 24, 82.) Specifically, Count II alleges violations involving: (1) age discrimination pursuant to 15 U.S.C. § 1691(a)(1) and (2) failure to provide adequate notice of adverse action and written appraisals pursuant to 15 U.S.C. § 1691(d) and (e) and related regulations. Although he does not cite it, 15 U.S.C. § 1691e(c) provides a private right of action for equitable or declaratory relief for "an aggrieved applicant" seeking to enforce the ECOA's requirements (or the related regulations at issue, pursuant to 15 U.S.C. § 1691a(g)) against a creditor.

i. Discrimination

Plaintiff's discrimination claim alleges discrimination based on section 1691(a)(1), which prohibits discrimination by a creditor against any applicant on the basis of "race, color, religion, national origin, sex or marital status, or age." The amended complaint appears to focus entirely on age discrimination and does not specifically address any other form of discrimination. (*See, e.g.*, AC ¶¶ 22, 22.)[6] Despite its length, the amended complaint is extremely sparse on specific factual allegations that directly apply toward any form of discrimination claim.

The Court understands plaintiff's discrimination claim to be based on a theory of disparate impact. (AC ¶ 20.) To state a claim for disparate impact, plaintiff must allege facts demonstrating "a significant disparate impact on a protected class caused by a specific, identified . . . practice or selection criterion." *Ramirez v. GreenPoint Mortgage Funding, Inc.*, 633 F. Supp. 2d 922, 927 (N.D. Cal. 2008).

[6] Plaintiff contends in his opposition brief that he was also a victim of gender and marital status discrimination. (RMS Oppo. at 9-12.) Plaintiff argues RMS employees "fixed on plaintiff's marital status insisting that plaintiff's estranged spouse would need to sign the loan documents and attend counseling if plaintiff was to qualify for the HECM." (*Id*. at 9.) However, the portions of the amended complaint he cites in support of this contention simply relate to the counseling requirement and RMS's refusal to consider his application based on the property's ownership status. They do not allege fixation on his marital status by RMS employees or their insistence that his wife sign loan documents. Because plaintiff does not specifically allege gender or marital status discrimination in his amended complaint, the Court will not accept these allegations—presented for the first time in his opposition brief—for purposes of considering this motion.

Here, plaintiff fails to meet that standard. Rather, plaintiff's allegations of discrimination based on age are inextricably intertwined with the status of the property being held in an irrevocable trust. For instance, plaintiff alleges he was discriminated against "because he was an 'elderly homeowner' who held the proposed real property security in an irrevocable living trust." (AC ¶ 20.) Plaintiff offers no specific, non-conclusory allegation to suggest RMS's decision not to process his loan application was based on his age. To the contrary, plaintiff alleges the reverse mortgage industry "actually target[s] elderly consumers" who are "unmindful of the high cost of reverse mortgage loan credit." (*Id.* ¶ 22.)

Plaintiff has not put forth specific facts of age discrimination that, accepted as true, make plausible his conclusory allegations that he was discriminated against based on age or that RMS employs a specific policy across-the-board that causes a significant disparate impact on elderly homeowners. Instead, the amended complaint itself suggests the basis for RMS's refusal to consider his loan application was likely the status of the property—namely, the fact that it was held in trust for third-party beneficiaries. Even if RMS implemented a policy to reject reverse mortgage applications where the property in question was held in irrevocable trust for the benefit of third parties, plaintiff has not pled any facts suggesting that policy would have a disparate impact on elderly homeowners. Plaintiff nowhere alleges RMS has granted reverse mortgages to younger applicants who merely hold a life estate in a property that is otherwise held in trust for the benefit of third-party beneficiaries. Only homeowners over the age of 62 are eligible for HECM loans. Moreover, reverse mortgages—as plaintiff points out in his pleadings—become increasingly risky on long time horizons. Given its contradictory allegations, the Court does not read the essence of the amended complaint to allege that RMS is discriminating against plaintiff on the basis of his age.

Finally, the Court notes that plaintiff's initial complaint did not include a claim of age discrimination, and only mentioned the ECOA in passing. The current conclusory allegations therefore appear to be no more than an attempt to establish standing in light of arguments raised in defendants' mooted initial motions to dismiss.

A complaint alleging sufficient facts to show that a lender rejected a loan application on

the basis of an applicant's age, marital status, or other consideration prohibited under the ECOA would typically state a claim for relief. The Court, however, will not credit wholly conclusory allegations of discrimination that lack any supporting factual allegations.

ii. Notice Requirements

Plaintiff next alleges violations of sections of the ECOA that place procedural notice and informational requirements on lenders. Specifically, he alleges violations of: (1) 15 U.S.C. § 1691(d)(1); (2) 15 U.S.C. § 1691(d)(2) (and the related 12 CFR § 202.9(a)); and (3) 15 U.S.C. § 1691(e). The Court addresses each provision in turn.

First, section 1691(d)(1) provides that "[w]ithin thirty days . . . after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application." While presenting a conclusory allegation that RMS violated this section, plaintiff elsewhere alleges RMS provided oral notice of its decision around September 26, 2013, a mere two days after plaintiff submitted his counseling certificate to RMS. (AC ¶¶ 25, 30.) It is not clear from the face of the pleadings when exactly plaintiff's "completed application" was submitted. Nevertheless, the Court cannot reasonably infer based on the timeline presented that it occurred more than thirty days prior to the September 26, 2013 notice of decision. Thus, plaintiff fails to state a claim under section 1691(d) based on the face of the amended complaint.

Second, section 1691(d)(2) provides that applicants are entitled to written explanations for adverse actions taken against them by creditors. A related section of Regulation B, issued by the Board of Governors of the Federal Reserve System pursuant to the ECOA, includes an additional requirement that the creditor first receive "a completed application." 12 CFR § 202.9(a). The regulation defines a "completed application" as one in which:

> . . . a creditor has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (including, but not limited to, credit reports, any additional information requested from the applicant, and any approvals or reports by governmental agencies or other persons that are necessary to guarantee, insure, or provide security for the credit or collateral).

12 CFR § 202.2(f).

Plaintiff's allegations in connection with this claim largely track the statutory language and

are close to conclusory. The Court finds, however, that plaintiff's allegations that RMS failed to provide him with written notification regarding its decision to refuse to process his application are sufficient to state a claim under these provisions. (AC ¶ 88.) As to Regulation B's "completed application" requirement, RMS argues plaintiff failed to provide it with sufficient information to constitute a completed application under the statute. However, plaintiff has alleged that he provided "personal and financial information" to RMS and "submitted a completed application." (AC ¶¶ 25, 53.) Those allegations are sufficient at this early stage of the case to survive under Rule 12(b)(6).

Finally, section 1691(e) provides that creditors shall provide to applicants copies of written appraisals and valuations developed in conjunction with their loan applications. Plaintiff alleges he received notice that his application could not be processed a mere two days after RMS forwarded a copy of the Trust documents to its legal counsel. No specific facts are alleged to support the suggestion that RMS developed written appraisals and valuations of the subject property during that brief and preliminary stage of the process. As RMS points out in its reply brief, plaintiff also inconsistently pleads that he requested the appraisals in writing and argues in his opposition brief that they were requested via phone conversations. (Dkt. No. 29 at 9.)

Based upon the foregoing, the Court therefore **GRANTS IN PART AND DENIES IN PART** RMS's Motion to Dismiss Count II. Plaintiff fails to state a claim for violation of the asserted provisions of the ECOA *except* for section 1691(d)(2)'s requirements of written notice in connection with adverse decisions (and the related provision of Regulation B).

C. Count III

Finally, under Count III, plaintiff alleges violations of the UCL. The UCL prohibits any unlawful, unfair or fraudulent business act or practice. Cal. Bus. & Prof. Code § 17200; *Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1999). First, as to the unlawful prong, plaintiff's UCL claim is predicated upon "violations of federal and state law" such as the ECOA. Second, as to the unfair conduct prong, plaintiff again puts forth his discredited theory that RMS was obligated to provide him with a loan so long as he was a "qualified applicant." Third, as to the fraudulent conduct prong, plaintiff alleges false advertising

by RMS (AC ¶¶ 21, 91), but the Court will not credit that bare and conclusory allegation—particularly in light of Rule 9(b) pleading requirements. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) ("[W]e have specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the . . . UCL."). Indeed, many of plaintiff's allegations relating to false or misleading advertising appear targeted at the reverse mortgage industry as a whole, as opposed to RMS in particular. Therefore, the Court will only consider the unlawful prong to determine whether the amended complaint properly states a claim under the UCL.

Plaintiff identifies as one such violation HUD's purported negligent supervision of RMS. Even if the allegation against HUD were warranted, it could not support a UCL claim against RMS. Plaintiff does, however, allege a number of other specific violations by RMS, such as a purported violation of 15 U.S.C. § 1691(d)(2) regarding provision of written notice relating to adverse action. As discussed above, plaintiff states a claim under that section. This would typically be sufficient to support his UCL claim. However, "ECOA bars pursuit of state law claims if the plaintiff also pursues relief under ECOA itself." *Cabrera v. Countrywide Home Loans Inc.*, Case No. 11-cv-4869 SI, 2013 WL 1345083, at *6 (N.D. Cal. Apr. 2, 2013) (dismissing UCL claim based on ECOA violation where plaintiff also brought a claim under the ECOA); *see also* 15 U.S.C. § 1691d(e). Because plaintiff has also brought a claim under the ECOA, he is not entitled to also assert a claim under California's Unfair Competition Law premised upon the same purported conduct. Plaintiff's UCL claim is therefore dismissed.

D. Leave to Amend

Leave to amend is liberally granted. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Chodos v. West Pub. Co.*, 292 F.3d 992, 1003 (9th Cir. 2002). Thus, the Court grants plaintiff leave to amend consistent with this Order. Counsel is cautioned that he must comply with his Rule 11 obligations.

Plaintiff shall file a Second Amended Complaint ("SAC") within **twenty-one (21) days** from the date of this Order. The SAC must comport with the guidelines set forth in this Order. It must not exceed 25 pages without permission from the Court and must comply with all applicable rules as to form. Plaintiff is strongly cautioned to revise substantially his complaint and focus

solely on the relevant factual allegations without unnecessary facts or legal argument. Any SAC must take care to set out clearly which allegations pertain to which defendants and which specific facts support each otherwise conclusory allegation. It must satisfy the requirements of Rule 8 and provide "*a short and plain statement* of [each] claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8 (emphasis added). Dismissed claims that plaintiff does not attempt to re-allege in light of this Order, or allegations that are otherwise irrelevant to plaintiff's claims, should be removed.

In light of the Court's order, RMS's motion to strike (RMS Mot. at 3-4) is **DENIED WITHOUT PREJUDICE AS MOOT**.

IV. CONCLUSION

Therefore, the Court orders as follows:

1) HUD's Motion to Dismiss is **GRANTED WITH LEAVE TO AMEND**.
2) RMS's Motion to Dismiss Count I is **GRANTED WITH LEAVE TO AMEND**.
3) RMS's Motion to Dismiss Count II is **DENIED** only in connection with RMS's purported violation of 15 U.S.C. § 1691(d)(2) and the related section of 12 CFR § 202.9(a). RMS's Motion to Dismiss Count II is otherwise **GRANTED WITH LEAVE TO AMEND**.
4) RMS's Motion to Dismiss Count III is **GRANTED WITH LEAVE TO AMEND**.

This Order terminates Docket Nos. 25 and 28.

IT IS SO ORDERED.

Dated: December 17, 2014

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE