

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOLADIN KAING, as an individual)	Case No. 09-5057 SC
and on behalf of all others)	
similarly situated,)	ORDER GRANTING MOTION TO
)	<u>DISMISS</u>
Plaintiff,)	
)	
v.)	
)	
PULTE HOMES, INC.; PULTE HOME)	
CORPORATION, and PULTE MORTGAGE)	
LLC,)	
)	
Defendants.)	
)	

I. INTRODUCTION

This is a putative class action suit brought by Plaintiff Soladin Kaing ("Plaintiff") against Defendants Pulte Homes, Inc. ("PHI"), Pulte Home Corporation ("PHC") and Pulte Mortgage LLC ("PM") (collectively, "Defendants" or "Pulte"). Defendants PHC and PM have filed a Motion to Dismiss for lack of standing and for failure to state a claim upon which relief can be granted. Docket No. 16 ("Motion"). PHI has also joined in this Motion. See Docket No. 14 at 7-8. This Motion is fully briefed. Docket No. 24 ("Opp'n"), 30 ("Reply").

Having considered all of the papers submitted by the parties, the Court concludes that Plaintiff lacks standing to assert each of her causes of action against Defendants. For the reasons stated

1 below, the Court hereby GRANTS the Motion to Dismiss.

2
3 **II. BACKGROUND**

4 PHI and its subsidiaries are variously engaged in the business
5 of building and selling homes, as well as financing the purchase of
6 homes by its customers. See Docket No. 1 ("Compl.") ¶ 1.

7 Plaintiff alleges that PHI "provide[s] 'one-stop shopping' where it
8 not only builds homes but it also provides virtually all of the
9 services needed to complete a home sale, including in-house sales
10 agents, financing, ancillary settlement services and appraisals."

11 Id. PHI is incorporated in, and headquartered out of, the State of
12 Michigan. See id. ¶ 10. PHC is an operating subsidiary that is
13 directly engaged in the business of home building, and which
14 regularly engages in business in the State of California. Compl.
15 ¶¶ 10, 12. PM is a subsidiary owned by PHC, which "is the lending
16 arm of Pulte Homes, Inc.," and which also maintains offices and
17 does business in California. Id. ¶¶ 10, 13.

18 In or about February of 2006, Plaintiff purchased a new house
19 from Defendants, located in Lathrop, California. Compl. ¶ 49. The
20 house was located in a subdivision called Mossdale Landing, in
21 which many or most of the homes were built, sold, and financed by
22 Defendants. See id. ¶ 2-4, 16. Plaintiff claims that "Defendants
23 marketed the house in the Pulte Aerial of Mossdale neighborhood as
24 stable and desirable." Id. ¶ 49.

25 According to Plaintiff, she used one of Pulte's in-house sales
26 agents to purchase the property. Id. She says that she was
27 "encouraged by Pulte Homes to use Pulte Mortgage to finance the
28 house," and was "provided significant financial incentives" to do

1 so. Id. ¶ 50. In particular, she was told that she would be
2 entitled to a \$75,000 price reduction if she utilized PM. Id.
3 ¶ 53, 55. When she inquired about whether she could instead use
4 Bank of America to finance the mortgage, she was told that she
5 would not receive this "discount" unless she used PM. Id. ¶ 53.
6 Although she was told that the contract price of the house was
7 \$575,365, she claims that "Pulte knew from appraisals on other
8 homes in the subdivision, that the house was worth less than
9 \$500,000." Id. ¶ 55. Pulte selected an appraiser, whom Plaintiff
10 claims was dependent upon Pulte for much of its business, and who
11 allegedly was under pressure to provide "inflated and pretextual"
12 appraisals. Id. ¶ 51. The appraiser valued the house at \$518,000,
13 which (according to Plaintiff) proves that the \$575,365 price
14 offered, as well as the \$75,000 discount, were "phony numbers from
15 the start." Id. ¶ 55. Plaintiff ultimately purchased the house
16 for \$518,215, with charges totaling \$531,972 after settlement fees.
17 Id. ¶ 56. Plaintiff paid a total of \$103,643 as a down payment,
18 and financed the rest through a loan from PM. Id.

19 According to Plaintiff, she "would not have and could not have
20 qualified for her loan" if she had been working with a "lender
21 acting in good faith in an arms-length transaction." Id. ¶ 57.
22 Her monthly income was less than \$3500, which she told PM when she
23 was applying for the mortgage. Id. ¶ 53. She notes that her
24 income was listed as "0" on the mortgage application provided to
25 her at closing. Id. Plaintiff also claims that no explanation of
26 the terms of the loan was provided to her, and no lender was
27 present to answer her questions when she executed the agreement.
28 Id. ¶ 52. Nevertheless, Plaintiff has not indicated that she has

1 been unable to make her regular payments on the mortgage, nor does
2 she allege that she has been harmed by any of the terms in the loan
3 documents to which she is a party -- although she does state, in
4 passing, that she has sought to modify the terms of her loan to
5 avoid foreclosure proceedings. Id. ¶ 58.

6 Plaintiff instead argues that she has been harmed by
7 Defendants' failure to:

8 provide Plaintiff with any disclosure that
9 Defendants had sold houses, and would sell houses
10 in the future, to unqualified and high-
11 foreclosure-risk buyers. Defendants also did not
12 disclose that they had sold houses, and planned
13 to sell houses in the future, to investors who
14 would not occupy the houses or to owners who were
15 not financially qualified.

16 Id. ¶ 61.

17 Plaintiff claims that Defendants' regular practice was to sell
18 houses in Mossdale Landing and other neighborhoods to unqualified
19 purchasers (as well as to investment purchasers) through subprime
20 loans and questionable loan practices. Id. ¶¶ 20-22. Plaintiff
21 argues that Pulte knew that "its practice would invariably lead to
22 loan defaults and foreclosures," and that these foreclosures had a
23 "devastating" impact on the value and desirability of the
24 neighborhoods. Id. ¶¶ 22-27. Yet Pulte "marketed the
25 neighborhoods as stable and desirable neighborhoods while becoming
26 even more aggressive in selling homes to unqualified and high-
27 foreclosure-risk buyers, in order to prop-up demand and sales
28 prices and continue receiving ever-increasing profits." Id. ¶ 28.
According to Plaintiff, Pulte's practices resulted in increasing
foreclosure rates in Mossdale Landing and other Pulte
neighborhoods, as its high-risk customers began defaulting on their

1 loans. Id. ¶ 31. Plaintiff believes that her home decreased in
2 value by over 50%. Id.

3 Plaintiff now seeks to represent a class of individuals who
4 have purchased homes from Pulte.¹ She raises four causes of
5 action: (1) violation of sections 17200 et seq., of the California
6 Business & Professions Code ("§ 17200"); (2) violation of
7 California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750
8 ("CLRA"); (3) negligent misrepresentation; and (4) breach of an
9 implied covenant of good faith and fair dealing.

10
11 **III. LEGAL STANDARD**

12 PHC and PM argue that Plaintiff has no standing to bring this
13 suit, and seek dismissal under Rule 12(b)(1) of the Federal Rules
14 of Civil Procedure. Federal Courts are limited to review of actual
15 "Cases" and "Controversies," as set out in Article III, section 2
16 of the Constitution. See Lujan v. Defenders of Wildlife, 504 U.S.
17 555, 560 (1992).

18 [T]he irreducible constitutional minimum of
19 standing contains three elements. First, the
20 plaintiff must have suffered an "injury in fact"
21 -- an invasion of a legally protected interest
22 which is (a) concrete and particularized, and (b)
actual or imminent, not "conjectural" or
"hypothetical." Second, there must be a causal
connection between the injury and the conduct

23 ¹ Plaintiff defines the proposed class as follows:

24 All purchasers of homes from Pulte Home from
25 January 1, 2005 through March 1, 2007, who lived
26 in such homes and still own or who sold their
27 home or who lost their home through judicial or
non-judicial foreclosure and whose property is in
the state of California in a "neighborhood" or
"Community" as defined by Pulte Home.

28 Compl. ¶ 65.

1 complained of -- the injury has to be fairly
2 traceable to the challenged action of the
3 defendant, and not the result of the independent
4 action of some third party not before the court.
Third, it must be "likely," as opposed to merely
"speculative," that the injury will be redressed
by a favorable decision.

5 Id. at 560-61 (internal quotation marks and citations omitted).

6 The Plaintiff has the burden of establishing these elements, and at
7 this stage of the litigation, "general factual allegations of
8 injury resulting from the defendant's conduct may suffice." Id. at
9 561.

10
11 **IV. DISCUSSION**

12 PHC and PM contend that Plaintiff lacks standing to bring this
13 suit. In particular, they claim that Plaintiff has failed to
14 allege an "injury in fact," and that whatever speculative injury
15 Plaintiff has alleged is not "fairly traceable" to Pulte's actions.
16 Mot. at 11.

17 As Plaintiff points out, she has attempted to set forth two
18 distinct theories of harm stemming from Pulte's conduct: "first,
19 due to Defendants' scheme, Plaintiff paid an inflated purchase
20 price for her home," and "[s]econd, due to Defendants' deceptive
21 marketing and lending practices, Plaintiff and the class have
22 suffered a decrease in property value" that is "greater than has
23 been suffered by houses in the surrounding areas." Opp'n at 7-8;
24 Compl. ¶¶ 55, 64. The Court will analyze each type of harm
25 separately to determine if it constitutes an injury caused by
26 Defendants, that suffices to give Plaintiff standing to sue.

27 **A. Plaintiff's Bait-and-Switch / Overcharge Theory**

28 Plaintiff alleges that Pulte represented that the contract

1 sale for the house was \$575,000, with a \$75,000 discount that was
2 "illusory" because the house was either "worth less than \$500,000"
3 or "at best \$518,000." Compl. ¶ 55. She describes this as a
4 "bait-and-switch" tactic that induced her to "act fast" and receive
5 financing from PM rather than Bank of America. Id. ¶¶ 54-55.
6 Plaintiff also states that, "prior to closing, the house was
7 appraised by Pulte at \$518,000." Id. at 55. Plaintiff integrates
8 this theory into her first two causes of action, for breach of
9 § 17200 and the CLRA. Id.²

10 The Court finds that it can resolve this issue solely on
11 statutory, rather than Constitutional, standing grounds. Courts
12 have held that, in some contexts, bait-and-switch tactics similar
13 to the one alleged by Plaintiff can cause an overpayment-type
14 injury in fact to plaintiffs. See, e.g., Laster v. T-Mobile United
15 States, Inc., 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005) (holding
16 that "bait-and-switch" advertising tactic suffices to establish
17 injury in fact under § 17200, but that plaintiff failed to plead
18 reliance). Presumably, if Pulte had applied the stated discount to
19 the genuine value of the house, Plaintiff would have paid only
20 \$443,000 or less (\$518,000 minus the \$75,000 discount). However,
21 standing under § 17200 requires more than mere allegations that a
22 defendant engaged in fraudulent or deceitful business practices.

23 _____
24 ² This Court reads Plaintiff's overpayment theory to rest solely
25 upon the alleged misrepresentations of value as outlined in the
26 complaint. Compl. ¶ 55. Plaintiff also alleges that Pulte offered
27 subprime loans to support "the creation of an artificial housing
28 demand and artificial willingness to pay above-market rates."
Compl. ¶ 21. As the Court reads the Complaint, Plaintiff appears
to have included these statements only to describe Pulte's motives
for issuing subprime loans. To the extent that Plaintiff intended
to allege that she overpaid as a result of Pulte's efforts to
artificially increase housing demand by offering subprime loans,
the Court rejects this line of argument as far too speculative.

1 Standing also requires a plausible claim of causation, which in
2 turn requires a showing of reliance. See Cal. Bus. & Prof. Code
3 § 17204 (limiting private right of action to those who have
4 "suffered injury in fact and has lost money or property as a result
5 of the unfair competition"); Hall v. Time Inc., 158 Cal. App. 4th
6 847, 856-57 (Ct. App. 2007) (discussing cases that have addressed
7 reliance as prerequisite to standing under § 17200).

8 In one sense, Plaintiff does plead that she relied upon
9 Defendants' claims that the contract price of the house was
10 \$575,000 -- she claims that she would have used Bank of America to
11 finance the purchase but for the "discount" offered by Defendants.
12 Compl. ¶ 54. However, she does not suggest that she was injured by
13 her use of PM rather than Bank of America. More importantly, she
14 does not claim that she paid the price she paid, or purchased the
15 home, because of Pulte's initial representations. Nor could she
16 plausibly do so. Any claim of reliance upon Defendants' initial
17 representation would be directly contradicted by her claim that she
18 received an appraisal prior to closing, and learned that the house
19 was appraised around \$518,000. See id. ¶ 55. Because she knew
20 that the house was worth less than the initial contract price
21 stated by Defendants before closing, she cannot plausibly claim
22 that she relied on the higher initial representation. The timely
23 appraisal undercuts any claim that she "lost money or property as a
24 result of the" alleged misrepresentation. C.f. Cal. Bus. & Prof.
25 Code § 17204. She has not pointed to any other loss or injury that
26 she suffered as a result of Defendants' alleged misrepresentation
27 as to the contract price of the house. She therefore has no
28 standing to sue under § 17200.

1 Plaintiff lacks standing to sue under the CLRA for the same
2 reason: without a plausible claim that she suffered an injury "as a
3 result of" the offending conduct, there is no standing to sue under
4 the CLRA. Cal. Civ. Code § 1780(a). In addition, application of
5 the CLRA is explicitly restricted to those who engage in a "sale or
6 lease of goods or services." Cal. Civ. Code § 1770. The CLRA does
7 "not apply to any transaction which provides for the construction,
8 sale, or construction and sale of an entire residence . . . with or
9 without a parcel of real property or an interest therein"
10 Id. § 1754. Even though the \$75,000 "discount" was established to
11 induce Plaintiff to use PM rather than other lenders, Plaintiff's
12 "bait-and-switch" allegations relate exclusively to the purchase
13 price of the house, rather than the ancillary services provided by
14 PM. Put otherwise, Plaintiff claims that she overpaid for the
15 house, and not the financial services. Consequently, this theory
16 is not grounded in a "sale or lease of goods or services" as
17 defined by the CLRA, and she lacks standing to assert her bait-and-
18 switch theory to establish an injury under the CLRA.

19 The Court therefore finds that Plaintiff lacks statutory
20 standing to pursue her bait-and-switch theory under either her
21 first or second causes of action.

22 **B. Plaintiff's Reduced-Value Theory**

23 Throughout her Complaint and four causes of action,
24 Plaintiff's primary theory is that she has been injured because
25 Pulte's lending practices caused widespread foreclosures in her
26 neighborhood, and this has driven down the value of her house.³

27 _____
28 ³ Because this theory is integrated into four causes of action,
including common law causes of action for negligent

1 This theory raises questions as to whether Plaintiff suffered a
2 Constitutionally cognizable injury in fact, and whether any such
3 injury was fairly traceable to Pulte's actions. Plaintiff argues
4 that she can establish an injury in fact merely by pleading that
5 the house has diminished in value. Opp'n to Mot. at 6.

6 To support her position, Plaintiff cites to Friends of the
7 Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., in which
8 the Supreme Court cited a reduction in home values, among various
9 other injuries, in finding that plaintiffs had standing to sue a
10 polluter for violating the Clean Water Act. 528 U.S. 167, 182-83
11 (2000). It is true that a diminution in the value of a house
12 caused by a change in that houses surrounding environment may
13 generally comprise an "injury in fact" for constitutional standing
14 purposes. See, e.g., Tyler v. Cuomo, 236 F.3d 1124, 1132 (9th Cir.
15 2000) (finding that homeowners had standing to sue government
16 entities over housing project, under the National Environmental
17 Policy Act and National Historic Preservation Act, because their
18 "homes are directly affected by changes to structures in the
19 neighborhood"). However, Plaintiff has not alleged that Pulte has
20 injured her by altering the physical environment around her house -
21 - only that Pulte has altered the general economic conditions of
22 her neighborhood. Pulte's practices affected the value of
23 Plaintiff's house because they caused foreclosures and short sales,
24 which "become the new comparative sales values for the
25 neighborhood, which result in a vastly lower market rate." Compl.

26
27 misrepresentation and breach of an implied covenant of good faith
28 and fair dealing, the Court will examine whether Plaintiff meets
the standing requirements grounded in Article III of the
Constitution, rather than individual statutes.

1 ¶ 26. These practices allegedly "result[ed] in abandoned houses;
2 multiple families living in one home; transient neighbors with no
3 long-term ties to the neighborhood; unfinished yards and unkempt
4 yards; and, in some cases, increased crime." Id. ¶ 27.

5 Compared to a diminution in value that is tied to a physical
6 change to the neighborhood's environment, such as pollution or the
7 construction of a new housing project, a decline in value that is
8 tied to a purely economic change to a neighborhood is much more
9 difficult to characterize as "concrete and particularized, and
10 actual or imminent." See Lujan, 504 U.S. at 560-61. Such economic
11 conditions are likely to change with the broader economy, and any
12 decline in housing value can potentially evaporate before Plaintiff
13 has suffered a concrete injury, even in the absence of redress from
14 the courts. Given that Plaintiff has not sold, or even attempted
15 to sell, her house under these new economic conditions, it is not
16 clear that the diminished value of her house is cognizable as an
17 "injury in fact."

18 As one court considering a similar complaint has articulated:

19 Since the reduced value about which Plaintiffs
20 complain would have resulted from an economic
21 glut of supply, then such harm is only realized
22 if Plaintiffs sell their home during such glut.
If Plaintiffs chose to remain in their home until
more favorable economic conditions arrive, then
they will have realized no loss at all.

23 Tingley v. Beazer Homes Corp., No. 07-176, 2008 U.S. Dist. LEXIS
24 34303, *14 n.3 (W.D.N.C. Apr. 25, 2008). The type of injury that
25 Plaintiff alleges "is of a type which would not necessarily have a
26 long term impact on home prices." Green v. Beazer Mortgage Corp.,
27 No. 07-1098, 2007 U.S. Dist. LEXIS 66887, *7 (D.S.C. Sept. 10,
28 2007) ("Plaintiff does not . . . suggest that she or any of her

1 other similarly 'injured' neighbors have realized this decrease in
2 value (e.g., as a result of sale of the home). Thus, the injury is
3 neither concrete nor particularized."). Consequently, this Court
4 finds that Plaintiff has failed to articulate an injury in fact
5 that is "concrete and particularized, and actual or imminent."
6 C.f. Lujan, 504 U.S. at 560-61.

7 Plaintiff faces a similarly insurmountable problem with
8 respect to the causation element of standing. "[T]he injury has to
9 be fairly traceable to the challenged action of the defendant, and
10 not the result of the independent action of some third party not
11 before the court." Lujan, 504 U.S. at 560-61. Any loss in value
12 that Plaintiff has suffered has resulted not just from the actions
13 of Pulte, but also from the independent actions of all of the
14 various residents of Plaintiff's neighborhood. She alleges that
15 Pulte entered into a myriad of independent contracts with each
16 independent homeowner; these homeowners independently defaulted and
17 independently decided to allow foreclosure, and this collectively
18 had an impact on the value of her home. Plaintiff's theory
19 therefore depends upon a chain of causation that is dependent upon
20 many factors, "such as unemployment, health problems, a general
21 weakening economy, or other financial conditions," the decisions of
22 various homeowners to foreclose rather than refinance,⁴ as well as
23 other economic factors that can have unpredictable effects on the
24 housing market. Tingley, 2008 U.S. Dist. LEXIS 34303 at * 11-12.
25 Any injury suffered by Plaintiff therefore necessarily depends upon

26 _____
27 ⁴ Plaintiff demonstrates that foreclosure has not been an
28 inevitable consequence of Pulte's practices; she herself received
financing through PM but has apparently not entered into
foreclosure, even though Pulte was allegedly irresponsible in
financing her loan. See Compl. ¶¶ 57, 58.

1 a causal chain that includes numerous individual decisions of "some
2 third part[ies] not before the court." Lujan, 504 U.S. at 560-61.

3 This Court therefore finds that Plaintiff has no standing to
4 sue for any subsequent reduction in value of the house resulting
5 from the economic consequences of Pulte's practices.

6
7 **V. CONCLUSION**

8 This Court finds that Plaintiff lacks statutory standing to
9 sue Pulte for its alleged bait-and-switch scheme. The Court
10 further finds that Plaintiff would be unable to amend her pleadings
11 so as to correct these deficiencies without directly contradicting
12 the pleadings set forth in her initial Complaint. Consequently,
13 Plaintiff's first and second causes of action are DISMISSED WITH
14 PREJUDICE as to Plaintiff's bait-and-switch allegations.

15 This Court further finds that Plaintiff lacks constitutional
16 standing to assert any cause of action based on a theory that
17 Defendants harmed her by causing her house to depreciate in value.
18 Consequently, all of Plaintiff's remaining causes of action are
19 DISMISSED WITH PREJUDICE.

20 Defendants' Motion to Strike, Docket No. 18, and the Motion to
21 Dismiss filed by Pulte Homes, Inc., Docket No. 14, are both DENIED
22 as moot.

23
24 IT IS SO ORDERED.

25
26 Dated: February 18, 2010

27 
28 UNITED STATES DISTRICT JUDGE