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7 Janette C. Miller and Miller and Perotti Real Estate Appraisals, Inc.

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10 TENISHA TATE-AUSTIN; PAUL AUSTIN; )  
and FAIR HOUSING ADVOCATES OF )  
11 NORTHERN CALIFORNIA, )

12 Plaintiffs, )

13 v. )

14 JANETTE C. MILLER; MILLER AND )  
PEROTTI REAL ESTATE APPRAISALS, )  
15 INC., AMC LINKS LLC; )

16 Defendants. )  
17 )  
18 )

Case No.: 3:21-cv-09319-MMC

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

**Date: August 5, 2022  
Time: 9:00 am  
Department: 7**

19 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE that on August 5, 2022 at 9:00 am, or as soon thereafter as the  
21 matter may be heard in the above-entitled court, located at the San Francisco Courthouse,  
22 Courtroom 7 – 19th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants  
23 Janette C. Miller and Miller and Perotti Real Estate Appraisals, Inc. will move the court to  
24 dismiss the action pursuant to FRCP 12(b)(6) because Plaintiffs’ seventh cause of action for  
25 negligent misrepresentation in the First Amended Complaint (“FAC”) fails to state a claim upon  
26 which relief can be granted.

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

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Dated: June 27, 2022

WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP

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

**MEMORANDUM OF POINTS AND AUTHORITIES**

**1. Introduction**

**a. Parties**

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

**b. Relevant Allegations**

On May 6, 2022, Plaintiffs filed a First Amended Complaint in the Northern District of California against Defendants Janette C. Miller, Miller and Perotti Real Estate Appraisals, Inc., and AMC Links LLC (“FAC”). Plaintiffs allege that all defendants discriminated against them on the basis of their race by preparing a February 12, 2020 appraisal below the fair market value of the real property they own located at 20 Pacheco Street in Sausalito, CA. (“Property”).

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

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

In March 2019, the Austins refinanced the Property again. An appraisal prepared for their lender valued the Property at \$1,450,000. (FAC, ¶45).

In early 2020, the Austins refinanced the Property for a third time. Their mortgage broker retained the services of Defendant AMC Links, LLC (“AMC Links”) in order to appraise

1 the Property for the lender. (FAC, ¶46). AMC Links contracted with Miller to appraise the  
2 Property. On January 29, 2020, Miller inspected the Property. (FAC, ¶47). On February 12,  
3 2020, Miller provided her appraisal of the Property in which she valued the Property at  
4 \$995,000. (FAC, ¶53).

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

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

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

## 15 **2. Legal Argument**

### 16 **a. Standard for 12(b)(6) Motion**

17 A “party” may assert by a Rule 12(b) motion to dismiss that a plaintiff has failed to state  
18 a claim upon which relief can be granted. FRCP 12(b)(6). A Rule 12(b)(6) motion is similar to  
19 the common law general demurrer—i.e., it tests the legal sufficiency of the claim or claims stated  
20 in the complaint. *Strom v. United States* (9th Cir. 2011) 641 F3d 1051, 1067; *SEC v. Cross Fin'l*  
21 *Services, Inc.* (CD CA 1995) 908 F.Supp. 718, 726-727 (quoting text); *Beliveau v. Caras* (CD  
22 CA 1995) 873 F.Supp. 1393, 1395 (citing text); *United States v. White* (CD CA 1995) 893  
23 F.Supp. 1423, 1428 (citing text).

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

1 be based on dispositive legal issue.

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

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

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

### 13 **b. Appraiser Liability in California**

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

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

20 Appraisers who erroneously value a property may be liable to persons who suffer  
21 damages in reliance upon the valuation (e.g., lender finances a secured loan in reliance on  
22 adequacy of the secured property but subsequently discovers the property was overvalued and  
23 thus not sufficient recourse for the loan). *See Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells*  
24 (2000) 86 CA4th 303, 310, fn. 3.

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

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

11 For example, an appraiser selected by the Veterans Administration to appraise property  
 12 that is the subject of a veteran's application for a VA-guaranteed loan is not liable to the  
 13 borrower for negligently undervaluing the property, as a result of which the borrower is rendered  
 14 ineligible for a VA loan and must obtain conventional financing at a greater cost. *Gay v. Broder*  
 15 (1980) 109 CA3d 66, 75. The VA's statutory duty to appraise property that is the subject of a  
 16 VA loan application (38 USC § 3710(b)(5)) is designed to protect the federal government from  
 17 having to assume the responsibility of a guarantor because of inadequate security. Since the  
 18 statute is directed at protecting the VA and not the loan applicant, the appraiser's duty of care  
 19 extends only to the VA. Otherwise, “[c]oncern with the possibility of claims against him for  
 20 refusing to set a value as high as the loan desired ... would deter the appraiser from reporting to  
 21 the [VA] his true opinion as to value and tend to cause him to breach his duty to the federal  
 22 government. The policy considerations against the imposition of liability in the instant case are  
 23 manifest.” *Gay v. Broder, supra*, 109 CA3d at 75.

24 **c. On the seventh cause of action for negligent misrepresentation, Plaintiffs, as**  
 25 **borrowers, fail to state a claim upon which relief can be granted against**  
 26 **Miller, as an appraiser.**

27 **i. Court's prior ruling on MTD**

28 In the Court's April 13, 2022 Order on the Motion to Dismiss, the Court made the

1 following ruling:

2 In the Seventh Claim for Relief, brought on behalf of the Austins, plaintiffs allege  
3 the Miller Defendants negligently misrepresented they “were providing an  
unbiased appraisal of the Pacheco Street House.” (See Compl. ¶ 103.)

4 To state a claim for negligent misrepresentation, a plaintiff must allege “(1) the  
5 misrepresentation of a past or existing material fact, (2) without reasonable  
6 ground for believing it to be true, (3) with intent to induce another’s reliance on  
7 the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5)  
8 resulting damage.” See Apollo Cap. Fund, LLC v. Roth Cap. Partners, LLC, 158  
Cal. App. 4<sup>th</sup> 226, 243 (2007). Additionally, a plaintiff must “allege facts  
9 establishing that [the] defendant[] owed him a duty to communicate accurate  
10 information.” See Friedman v. Merck & Co., 107 Cal. App. 4<sup>th</sup> 454, 477 (2003).

11 Here, the Miller Defendants contend plaintiffs “have not alleged that they relied  
12 upon [Miller’s] appraisal in any detrimental way.” (See Mot. at 18:21-19:12.) The  
13 Court agrees that plaintiffs’ facts are insufficient to support their conclusory  
14 allegation that the Austins “reasonably relied on defendants’ representations” (see  
15 Compl. ¶ 105); indeed, plaintiffs allege the Austins were “[s]hocked” by Miller’s  
16 low valuation and obtained another appraisal, on which they were able to  
17 refinance their mortgage (see Compl. ¶¶ 68, 77).[fn 17]

18 Accordingly, the Austins’ Seventh Claim for Relief is subject to dismissal.

19 Fn 17: In light of this finding, the Court does not address herein the Miller De-  
20 fendant’s additional argument that they did not owe the Austins a duty of care.

21 **ii. “New” allegations in FAC**

22 Plaintiffs amended one paragraph in the Facts Section in an attempt to plead around the  
23 Court’s ruling on the negligent misrepresentation cause of action:

24 68. The Austins were shocked by the Miller Report and the appraised value of  
25 the Pacheco Street House. If the Austins had known that Miller’s representations  
26 concerning her USPAP compliance, use of valid comps, and lack of bias were  
27 false representations, they would not have used the Miller Defendants to appraise  
28 their house. As a result of the Miller Defendants’ conduct, and the Austins’  
reliance on their representations, the Austins were unable to obtain financing at  
the interest rate of 3.875%. The Austins, through their broker, contacted AMC  
Links and requested a second appraisal by a different appraiser. By the time that  
the second appraisal was completed, however, the available interest rate for their  
mortgage loan was 3.99%. (FAC, ¶68)

Miller notes that the allegation that *had* Plaintiffs known about Miller’s false  
representations that they “would not have used the Miller Defendants to appraise their house...”  
is suspect for two reasons. First, this allegation is belied by Plaintiffs’ earlier allegation  
acknowledging that, after the Dodd-Frank Act was passed, appraisers are chosen at random by  
AMCs, not borrowers (or lenders or mortgage brokers). (FAC, ¶29). Plaintiffs did not have any

1 role in choosing the appraiser. Moreover, Plaintiffs do not allege that they had any role in  
 2 choosing the appraiser. Second, it is illogical to argue that had they known that Miller would  
 3 make future false representations in the appraisal of Plaintiff's Property, they would not have  
 4 "used" her to draft the appraisal. It is unclear how Plaintiffs would have known about Miller's  
 5 alleged false representations before she made them.

6 Plaintiffs amended one paragraph in their allegations supporting this cause of action:

7 106. Plaintiffs reasonably relied on defendants' representations in attempting to  
 8 secure a mortgage loan with favorable terms and were unable to obtain a loan on  
 9 those terms as a result of defendants' misrepresentations. As a result of defendants'  
 misrepresentations and the resulting delay in obtaining the loan, the loan terms  
 eventually made available to plaintiffs were inferior and more costly (FAC, ¶106).

10 **iii. The FAC fails to state a cause of action against Miller.**

11 **1. Plaintiffs fail to allege specific facts to show that they**  
 12 **reasonably relied upon the Miller Appraisal.**

13 The Court has already ruled that Plaintiffs must plead specific facts to show that they  
 14 reasonably relied upon the Miller Appraisal. (See Order, 20:2-16). Plaintiffs must plead and  
 15 prove facts showing their actual and justifiable reliance on the false statement. *Mirkin v.*  
 16 *Wasserman* (1993) 5 C4th 1082, 1089, 1095, fn. 2; *Garcia v. Sup.Ct. (State of Calif.)* (1990) 50  
 17 C3d 728, 737.

18 Plaintiff "actually" relies on a misrepresentation when it plays a substantial role in  
 19 influencing plaintiff's actions—i.e., but for the representation, plaintiff would likely not have  
 20 behaved in the same way. *Conroy v. Regents of Univ. of Calif.* (2009) 45 C4th 1244, 1256.

21 Here, Plaintiffs have failed to allege any specific facts to show how they *actually* relied  
 22 upon the Miller Appraisal. Other than alleging that they were "shocked" by the valuation in the  
 23 Miller Appraisal (FAC, ¶68) such that they requested that their AMC order a second appraisal,  
 24 Plaintiffs failed to allege that they actually relied upon the Miller Appraisal to their detriment.  
 25 Plaintiffs made no change in their behavior when they received the Miller Appraisal other than to  
 26 request a second appraisal. As discussed below, Plaintiffs' alleged harm in obtaining a higher  
 27 refinance rate was not caused by the Miller Appraisal. It was caused by the increase in the  
 28 market rate one month later.

1 Plaintiffs previously cited to *Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760, for  
2 support. However, the Court in *Willemssen v. Mitrosilis* (2014) 230 Cal. App. 4th 622  
3 distinguished *Soderberg*:

4 In *Soderberg*, the appraiser issued an appraisal to a mortgage broker with the  
5 knowledge and intent that the mortgage broker would distribute it to a class of  
6 potential investors who would rely thereon in making their decision to invest or not  
7 invest. In the matter before us, however, there is no indication that the ... Defendants  
8 issued their appraisal report with the knowledge or intent that Willemssen would  
9 rely upon it in deciding whether to buy or not to buy the property .... Rather, they  
10 knew and intended that the bank would use the appraisal report in determining  
11 whether the property had sufficient value to serve as its collateral. *Willemssen v.*  
12 *Mitrosilis* (2014) 230 Cal. App. 4th 622, 631–32.

13 Similarly, the Court in *Tindell v. Murphy* (2018) 22 Cal. App. 5th 1239 rejected the  
14 borrower’s reliance arguments:

15 The Tindells seek to distinguish *Willemssen*, arguing “the evidence shows that the  
16 Respondent knew of the Appellants specific transaction and also that the Plaintiff  
17 and his broker were waiting to see if the home was the type of home that was able  
18 to obtain financing. Therefore, here, unlike in *Willemssen*, the Appellants are suing  
19 for the same harm caused by the Respondent's failure to have provided an accurate  
20 appraisal to the lender (i.e. her failure to have indicated in her report that the  
21 property was NOT property that was sufficient collateral for the property to be  
22 financed.”

23 We are not convinced by the Tindells' efforts to distinguish *Willemssen*. As the trial  
24 court noted, the appraisal was prepared for the lender, not the Tindells. *Tindell v.*  
25 *Murphy* (2018) 22 Cal. App. 5th 1239, 1247.

26 The Court in *Tindell* affirmed the dismissal of a negligent misrepresentation cause of  
27 action (at the pleadings stage) similar to the one alleged in the FAC. It is undisputed that the  
28 appraisal is prepared for the lender, not the borrower. Plaintiffs did not rely on the appraisal in  
making any decisions.

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

1 upon the Miller Appraisal in making any decision to refinance the Property.

2 Based upon the allegations, not one individual or entity involved, including the Austins,  
3 FHANC, the Austin's mortgage broker, or even AMC Links, actually relied upon the Miller  
4 Appraisal in making any decisions regarding the Austins' refinance. The Austins allege that the  
5 one-month delay resulted in them refinancing under less favorable terms. However, as the Court  
6 of Appeal held in *Gay*, a borrower cannot sue an appraiser for undervaluing a property that leads  
7 to the borrower obtaining a loan on less favorable terms. *Gay v. Broder* (1980) 109 CA3d 66,  
8 75. For these reasons, Plaintiffs fail to state a claim upon which relief can be granted. This  
9 Motion should be granted.

10 **2. Plaintiffs fail to allege specific facts to show that Miller owed**  
11 **them a duty.**

12 Defendant must be under a duty to plaintiff to exercise reasonable care in giving the  
13 information. The duty may be imposed by contract, law, a fiduciary or confidential relationship,  
14 a voluntary decision to speak or otherwise. *Garcia v. Sup.Ct. (State of Calif.)* (1990) 50 C3d 728,  
15 734; *Eddy v. Sharp* (1988) 199 CA3d 858, 864; compare *Goonewardene v. ADP, LLC* (2019) 6  
16 C5th 817, 841-842—negligent misrepresentation claim not permitted where no general  
17 negligence duty owed to plaintiff.

18 Here, as discussed above, California law is clear that an appraiser owes no duty to a  
19 borrower with regard to the accuracy of an appraisal. See *Willemsen, supra*, 230 CA4th at 629  
20 (noting borrower should know lender's appraisal is intended for lender's benefit, not to ensure  
21 success of borrower's investment); see also *Tindell, supra*, 22 CA5th at 1253-1254 finding that  
22 the lender's appraiser had no duty of care to borrowers for inaccurate property description as  
23 appraisal was intended to support lender's evaluation of collateral, not borrowers' decision  
24 whether to purchase property. Both the Court in *Willemsen* and *Tindell* affirmed the dismissal of  
25 claims for negligent misrepresentation by a borrower against an appraiser based upon the lack of  
26 duty.

27 Plaintiffs' allegations suggest that they are aware that the Miller Defendants owed no  
28 duty to them. When the Austins received the Miller Appraisal with which they disagreed, "[t]he

1 Austins, through their broker, contacted AMC Links and requested a second appraisal by a  
 2 different appraiser.” (FAC, ¶68). It appears that the Austins did not contact the Miller  
 3 Defendants because they knew that the Miller Defendants owed them no duty.

4 Fatally, the Austins admit that they complained to their mortgage broker about the  
 5 alleged low value provided by Miller. (FAC, ¶68). The mortgage broker, in turn, contacted  
 6 AMC Links who contracted with another appraiser to prepare a second appraisal. The Austins  
 7 further admit that they were able to refinance the Property and that their lender relied upon the  
 8 second appraisal rather than the Miller Appraisal in making the decision to make the loan to  
 9 refinance the Property. (FAC, ¶77). For these reasons, Plaintiffs fail to state a claim upon which  
 10 relief can be granted. This Motion should be granted.

11 **d. Plaintiffs fail to allege specific facts to show that they suffered compensable**  
 12 **damages.**

13 In claims against real estate appraisers in California, “[t]he proper measure of tort  
 14 damages is the ‘out-of-pocket’ measure; successful tort plaintiffs are not entitled to have  
 15 damages computed on a contract, or ‘benefit-of-the-bargain,’ theory.” *Christiansen v. Roddy*  
 16 (1986) 186 Cal. App. 3d 780, 790 citing to CC§§ 3333, 3343; *Overgaard v. Johnson* (1977) 68  
 17 Cal.App.3d 821, 823.

18 Examples of out of pocket damages have been provided by the Court of Appeal:  
 19 “pursuant to Civil Code section 3343, amounts paid for escrow fees, moving to and from the  
 20 property, building permits, telephone connections, fences, yard cleaning, garage materials, door  
 21 locks, shrubbery, taxes, rent and labor are examples of recoverable damages when reasonably  
 22 expended in reliance on the fraud. *Cory v. Villa Properties* (1986) 180 Cal. App. 3d 592, 603  
 23 (citing to *Hardy v. Carmichael* (1962) 207 Cal.App.2d 218, 228.)

24 Here, the Austins claim that they suffered damages because they were unable to refinance  
 25 the Property at the initial rate of 3.875%. According to Plaintiffs, “[b]y the time that the second  
 26 appraisal was completed, however, the available interest rate for their mortgage loan was  
 27 3.99%.” (FAC, ¶68). The Miller Defendants note that the time between the Miller Appraisal and  
 28 the second appraisal was a matter of “days” (“Within days, a different appraiser inspected the

1 Austins’ house...” (FAC, ¶2)). Regardless, as discussed above, the Miller Defendants owed  
2 Plaintiffs no duty with regard to the Miller Appraisal. Moreover, the Miller Defendants, hired  
3 and working on behalf of the lender and the AMC Defendant, owed no duty to Plaintiff to  
4 guarantee a specific interest rate on a refinance. The difference in the interest rate allegedly  
5 suffered by the Austins is not a compensable damage against a real estate appraiser in California.  
6 For these reasons, Plaintiffs fail to state a claim upon which relief can be granted. This Motion  
7 should be granted.

8 **3. Conclusion**

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

10  
11 Dated: June 27, 2022

WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP

12  
13 By: /s/ Peter Catalanotti  
14 Peter C. Catalanotti  
15 Madonna Herman  
16 Attorneys for Defendants,  
17 Janette C. Miller and Miller and Perotti  
18 Real Estate Appraisals, Inc.  
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**PROOF OF SERVICE**

At the time of service I was over 18 years of age and not a party to this action. I am employed by in the County of San Francisco, State of California. My business address is 655 Montgomery Street, Suite 900, San Francisco, CA 94111. My business Facsimile number is (415) 434-1370. On this date I served the following document(s):

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

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

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

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

: **BY COURT’S CM/ECF SYSTEM** - Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

**SEE ATTACHED SERVICE LIST**

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

EXECUTED on June 27, 2022, at San Francisco, California.

/s/ Michael Folger  
Michael Folger

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**SERVICE LIST**

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