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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICARDO GOMEZ, Plaintiff, v. QUICKEN LOANS, INC. AND DOES 1-10 , Defendants.	CASE NO. 2:12-cv-10456- RGK-(SHx) **UNITED STATES OF AMERICA'S STATEMENT OF INTEREST IN OPPOSITION TO QUICKEN LOANS, INC.'S MOTION TO DISMISS** The Hon. R. Gary Klausner Courtroom: 850-LA-Roybal Date: April 22, 2013 Time: 9:00 a.m.

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C § 517, because this litigation implicates the proper interpretation and application of the Fair Housing Act, 42 U.S.C. §§ 3601-3619 ("FHA"), and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"). The Department of Justice has authority to enforce the FHA and the ECOA and to intervene in any proceeding that involves the FHA. 42 U.S.C. §§3613(e), 3614(a); 15 U.S.C. § 1691e(h). The United States thus has a strong interest in the issues raised in this motion, and believes that its participation will aid the court in resolution of these issues.

In the instant Statement of Interest, the United States takes no position on the merits of Plaintiff's case. Due to the issues raised by Defendant Quicken Loans, Inc. ("Quicken") in its Motion to Dismiss First Amended Complaint ("MTD"), the United States respectfully wishes to clarify for the Court the proper standard for claims of discrimination under the FHA and the ECOA.

I. BACKGROUND

The First Amended Complaint ("FAC") alleges that Plaintiff Ricardo Gomez applied for a mortgage refinance loan from Defendant Quicken Loans, Inc. ("Quicken") four times between February 2010 and July 2012, and each time a loan was originated by Quicken. FAC ¶¶ 10, 13-16, 18, 19, 23. Mr. Gomez has a disability[1] and receives Social Security Disability Insurance ("SSDI") income. FAC ¶ 4. For his first mortgage application, Quicken required Mr. Gomez to provide medical proof of his disability to establish that his SSDI income would continue; Mr. Gomez objected, but ultimately provided a letter from his doctor. FAC ¶¶ 11-

[1] The word "disability" is used interchangeably with "handicap," as defined in 42 U.S.C. § 3602(h).

12. Mr. Gomez submitted the three subsequent refinance applications after being contacted by Quicken as part of its roll-down program. For the second mortgage application, Quicken did not ask for further proof that his disability income would continue. FAC ¶ 15. For the third application, Quicken required that Mr. Gomez resubmit the letter from his doctor. FAC ¶ 17. At the time of the fourth application, Quicken required Mr. Gomez to provide updated medical proof of his current and permanent disability status; Mr. Gomez again objected but provided a letter from his doctor. FAC ¶ 21-22.

The FAC alleges that it was Quicken's policy to require loan applicants with disabilities receiving disability income to provide medical information about their disabilities as a condition of receiving a mortgage. FAC ¶ 24. The FAC alleges that this policy is ongoing. FAC ¶ 29.

II. ***SMITH V. CITY OF JACKSON* DID NOT OVERRULE, EXPLICITLY OR IMPLICITLY, DECADES OF FHA DISPARATE IMPACT PRECEDENT**

Quicken argues that *Smith v. City of Jackson*, 544 U.S. 228 (2005), reversed precedents holding that disparate impact claims may be brought under the FHA. MTD 13-14. *Smith* held that the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ('ADEA'), permitted disparate impact claims, by comparing language in the ADEA to certain language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ('Title VII'). *Smith* did not hold either that language identical to the ADEA or Title VII was mandatory to assert disparate impact claims, nor that the ruling applied beyond the ADEA. Consequently, every court to have considered the issue has rejected Quicken's argument that *Smith* precludes disparate impact claims under the FHA and ECOA, and this Court should do the same.

A. The Ninth Circuit Has Held that the FHA Permits Disparate Impact Claims, Before and After *Smith*

Quicken's analysis of *Smith* provides no basis for this Court to ignore the authority of cases in the Ninth Circuit -- decided after *Smith* -- permitting disparate impact claims under the FHA. *See, e.g.*, *Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690, 711 (9th Cir. 2009) (standard for FHA disparate impact claim); *McDonald v. Coldwell Banker*, 543 F.3d 498, n.7 (9th Cir. 2008) (FHA claims may be brought as disparate impact or disparate treatment); *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1194-95 (9th Cir. 2006) (standard for FHA disparate impact claim). These cases are consistent with Ninth Circuit precedent before *Smith*. *See, e.g.*, *Gamble v. City of Escondido*, 104 F.3d 300, 304-305 (9th Cir. 1997) ("A plaintiff can establish an FHA discrimination claim under a theory of disparate treatment or disparate impact."); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982). The Ninth Circuit precedent alone disposes of Quicken's argument

Quicken asks the Court to disregard this Circuit's binding precedent based solely on Quicken's analysis of *Smith*. MTD at 14. To adopt Quicken's argument would be legal error because this Court is bound to apply the law of the Ninth Circuit. *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001). Unless and until the Supreme Court or the Ninth Circuit sitting *en banc* holds otherwise, disparate impact claims are cognizable under the FHA in this Circuit.

B. Other Circuits Have Held That the FHA Permits Disparate Impact Claims, Before and After *Smith*

Prior to *Smith*, ten other circuits agreed with the Ninth Circuit that the FHA authorizes disparate impact claims. Several courts of appeals similarly recognized

disparate impact liability under the ECOA.[1] No court of appeals has revisited this issue, much less overruled or repudiated its prior decisions, in light of *Smith*. To the contrary, the Circuit courts have repeatedly affirmed, after *Smith*, that the FHA permits disparate impact claims. *See Smith v. NYCHA*, 410 F. App'x 404, 406 (2d Cir. 2011) (disparate impact claims available under FHA); *Mt. Holly Gardens Citizens in Action v. Twp. of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011) ("The FHA can be violated by either intentional discrimination or if a practice has a disparate impact on a protected class."), *petition for cert. filed*, 80 U.S.L.W. 3711 (U.S. June 11, 2012) (No. 11-1507); *Astralis Condo. Ass'n v. Sec'y, HUD*, 620 F.3d 62, 66 (1st Cir. 2010) (recognizing disparate impact claim under FHA); *Graoch Assocs. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 371-74 (6th Cir. 2007) (setting standard for FHA disparate impact claim); *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007) (FHA disparate impact claim need not prove intent).

C. HUD's Disparate Impact Rule Formalizes Disparate Impact Claims Under the FHA

On February 8, 2013, the Department of Housing and Urban Development

[1] The FHA cases are *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974); *Mountain Side Mobile Estates P'ship v. Sec'y HUD*, 56 F.3d 1243, 1251 (10th Cir. 1995); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984). Only the D.C. Circuit has not decided the issue. *See Greater New Orleans Fair Hous. Action Ctr. v. HUD*, 639 F.3d 1078, 1085 (D.C. Cir. 2011).

The ECOA cases are *Golden v. City of Columbus*, 404 F.3d 950, 963 n.11 (6th Cir. 2005); *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir. 1992); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1100 (5th Cir. 1987); *Miller v. Am. Express Co.*, 688 F.2d 1235, 1239-40 (9th Cir. 1982). No circuit court has held otherwise.

("HUD") issued a new rule, effective March 18, 2013. The rule, commonly referred to as the Disparate Impact Rule, formalizes disparate impact claims under the FHA. 24 C.F.R § 100.500. The rule is part of the implementing regulations of the FHA and states that "[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons. . . ." *Id.* In the summary that accompanies the rule, HUD notes that it has long recognized that proof of discriminatory effects may establish liability under the FHA and that the eleven courts of appeal that have ruled on the issue agree. Fed. Reg. Vol. 78, No. 32, Feb. 15, 2015.

III. DISPARATE TREATMENT CLAIMS DO NOT REQUIRE PROOF OF ILL INTENT

Defendant is mistaken in its assertion that disparate treatment claims require allegations of ill intent. MTD at 6. Under a disparate treatment theory, plaintiff must show that the defendant "treats some people less favorably than others because of their membership in a protected class." *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977). Disparate treatment claims do not require allegations that the defendant acted with animus, only that the defendant intended to treat members of the protected class differently. *See Beck v. United Food and Commercial Workers Union, Local 99*, 506 F.3d 874, 884 n.4 (9th Cir. 2007) ("animus is not required" for Title VII claim). In fact, the Supreme Court has observed that most discrimination against persons with disabilities is due to thoughtlessness, not animus. *Alexander v. Choate*, 469 U.S. 287, 296 (1985) (Rehabilitation Act).

The facts alleged in the FAC fit closely with an example of disparate treatment given in the Official Staff Interpretation of Regulation B, the implementing regulations for the ECOA. The Staff Interpretation states that

"disparate treatment would exist" when "[a] creditor requires a minority applicant to provide greater documentation to obtain a loan than a similarly situated nonminority applicant." 12 C.F.R. pt. 202, Supp. I., Official Staff Interpretations, at 55-56. This type of claim does not require ill intent, only intent to treat the protected class differently.

IV. CLAIMS UNDER ECOA DO NOT REQUIRE DENIAL OF CREDIT

Defendant is mistaken in its argument that the fact that Quicken approved Mr. Gomez's loans somehow negates intent or "renders his ECOA cause of action defective." MTD 15. The relevant portion of the ECOA provides that "[i]t shall be unlawful for any creditor to discriminate against any applicant, *with respect to any aspect of a credit transaction* . . . because all or part of the applicant's income derives from any public assistance program." 15 U.S.C. § 1691(a)(2) (emphasis added). The regulations governing ECOA define a "credit transaction" as:

> every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, *information requirements*; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures).

12 C.F.R. § 202.2(m) (emphasis added). The Official Staff Interpretation of the implementing regulations provides several examples of violations of the ECOA that do not require denial of credit. *See* 12 C.F.R. pt. 202, Supp. I., Official Staff Interpretations.

The Ninth Circuit and district courts within the Ninth Circuit have held that

plaintiffs may state claims under ECOA under circumstances that did not include denial of credit. *See, e.g., United States v. Union Auto Sales, Inc.*, 2012 WL 2870333, *2 (9th Cir. 2012); *Hernandez v. Sutter West Capital,* 2010 WL 3385046, *3 (N.D. Cal. 2010); *Ramirez v. GreenPoint Mortg. Funding, Inc.*, 633 F. Supp. 2d 922, 928-29 (N.D. Cal. 2008); *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1067-69 (S.D. Cal. 2008). There is no requirement that credit be denied to state a claim under the ECOA.

V. CONCLUSION

Defendant's brief contains a number of misstatements of law with regard to the FHA and the ECOA. The United States respectfully asks the Court to reject Defendant's misstatements.

Dated: April 1, 2013 Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lucy G. Carlson, hereby certify that on April 1, 2013, a copy of the filed document, United States of America's Statement of Interest in Opposition to Quicken Loans, Inc.'s Motion to Dismiss, will be sent via email to the following counsel of record in the matter *Gomez v. Quicken Loans, Inc.*, Case No. 2:12-cv-10456- RGK-SH.

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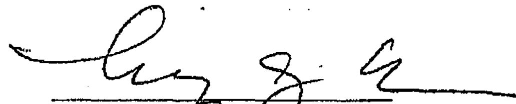

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