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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,)	Case No. <u>CV-13-2340-SBA</u>
)	
Plaintiff,)	UNITED STATES' OPPOSITION TO MOTION
)	TO DISMISS
v.)	
)	
REUNION MORTGAGE, INC.,)	Hearing Date: October 29, 2013
)	Hearing Time: 1:00 p.m.
DAVID THAYER, and R. KENT HARVEY)	
)	
Defendants.)	

I. INTRODUCTION

The United States has sued Defendants Reunion Mortgage ("Reunion") and Reunion's President, co-owner and Designated Broker David Thayer ("Thayer") under the False Claims Act ("FCA") and common law, alleging misconduct in making twelve Housing and Urban Development ("HUD") Federal Housing Administration ("FHA") insured mortgage loans. (ECF No. 10). More specifically, the United States alleges that Reunion is an FHA Direct Endorsement Lender ("DEL") and its employees falsely

1 certified to HUD that they had complied with pertinent HUD-FHA regulations, handbooks, Mortgagee
2 Letters, Title I Letters, and policies when underwriting and endorsing the twelve mortgage loans, when
3 they had not. The United States alleges that Thayer is vicariously liable for the false certifications of the
4 Reunion employees. The United States also alleges that Thayer himself falsely certified to HUD that
5 Reunion employees complied with pertinent HUD-FHA regulations, handbooks, Mortgagee Letters,
6 Title I Letters, and policies during the period the twelve mortgage loans were underwritten by Reunion,
7 when they had not. This misconduct caused HUD FHA to insure the loans and to pay over \$1.6 million
8 in insurance claims on the twelve mortgage loans, once the loans defaulted.
9

10 The United States has sued Reunion, Thayer, and Reunion's Vice President and co-owner R.
11 Kent Harvey ("Harvey") for improperly transferring \$1,775,783.50 from Reunion to Thayer and Harvey
12 in the form of a dividend that rendered Reunion insolvent and unable to pay its debt to the United States,
13 in violation of the Federal Debt Collection Procedure Act ("FDCPA"). (ECF No. 10).
14

15 Defendant Thayer has now moved under Fed. R. Civ. P. 12(b)(6) to dismiss the FCA and
16 common law claims against him in his individual capacity.¹ (ECF No. 16). Thayer argues that the (1)
17 United States has not satisfied Rule 9(b)'s particularity requirement against him, and (2) he cannot be
18 vicariously liable for Reunion's fraudulent actions. Both Thayer and Reunion have moved to dismiss
19 the common law claims as barred by the statute of limitations. (ECF No. 16 at 8-10).
20

21 The United States herein opposes the Motion because the United States has stated claims against
22 Defendant Thayer for direct and vicarious liability with sufficient particularity, and the common law
23 claims are timely.
24
25

26 ¹ Neither Reunion, Thayer nor Harvey have moved to dismiss the FDCPA claims. It does not
27 appear Reunion has moved to dismiss the FCA claims against Reunion. Harvey answered the First
28 Amended Complaint on August 23, 2013. (ECF No. 17).

1 **II. ARGUMENT**

2 **A. The United States Has Stated Claims Against Defendant Thayer with Sufficient**
 3 **Particularity.**

4 Defendant Thayer contends that there is no specific allegation in the complaint against him in his
 5 individual capacity. (ECF No. 16 at 3-7). This argument fails. Complaints brought under the FCA
 6 must fulfill the requirements of Fed. R. Civ. P. 9(b). See Bly-Magee v. California, 236 F.3d 1014, 1018
 7 (9th Cir. 2001). Generally, Rule 9(b)'s particularity requirement includes "the who, what, when, where,
 8 and how of the misconduct charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.
 9 2003). Here, the misconduct charged is implied false certification under FCA and common law. The
 10 elements of implied certification include the (1) false statement or fraudulent conduct; (2) made with
 11 scienter; (3) which was material; and finally, (4) made the government pay or lose money it owned.
 12 United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1174 (9th Cir. 2006).

13
 14 In order to survive a motion to dismiss, a complaint alleging a defendant's false certification
 15 must plead with particularity a "reasonable basis" that "(1) the defendant explicitly undertook to comply
 16 with a law, rule or regulation that is implicated in submitting a claim for payment and that (2) claims
 17 were submitted (3) even though the defendant was not in compliance with that law, rule or regulation."
 18 Ebeid v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010). The complaint must include "particular details of
 19 a scheme to submit false claims paired with reliable indicia that lead to a strong inference that the claims
 20 were actually submitted." Id. at 998-999 (citing United States ex rel. Grubbs v. Ravikumar Kanneganti,
 21 565 F.3d 180, 190 (5th Cir. 2009). Not "all facts supporting each and every instance" are required, id. at
 22 999 (citing United States ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1051 (9th Cir. 2001)),
 23 but the complaint must possess enough detail to put defendants on "notice of the particular misconduct
 24 alleged to constitute fraud." Id. (citing United States ex rel. Grubbs v. Ravikumar Kanneganti, 565 F.3d
 25 at 190).

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3 1. The United States Has Stated an Implied False Certification Claim as to Defendant Thayer.

4 Here, the United States has properly pleaded all the elements of implied false certification claim
5 against Thayer. The United States has alleged that Reunion is a Direct Endorsement Lender with HUD.
6 Once a DEL, in order to remain one, Thayer, as Reunion's designated broker and President, must
7 annually certify the following to HUD:

8 "I certify that I know, or am in the position to know, whether the operations of the above-
9 named lender conform to HUD-FHA regulations, handbooks, Mortgagee Letters, Title I
10 Letters, and policies; and that I am authorized to execute this report on behalf of the
11 lender.

12 I certify that the lender complied with and agrees to continue to comply with HUD-FHA
13 regulations, handbooks, Mortgagee Letters, Title I Letters, policies, and terms of any
14 agreements entered into with the Department."

15 (ECF 10 at 9-11). The United States has alleged that each of the twelve loans contained material
16 underwriting deficiencies and did not conform to HUD-FHA regulations, handbooks, Mortgagee Letters,
17 Title I Letters, and policies, making Thayer's certification a false statement. (ECF No. 10 at 10-22).
18 Thus, the United States stated the first element of a false certification action against Thayer. The United
19 States alleges that Thayer knowingly, with deliberate ignorance or reckless disregard, made that false
20 statement, fulfilling the second element of implied false certification. (ECF No. 10 at 9-11, 23-24). The
21 third and fourth elements of implied certification have also properly been pleaded: Thayer's false
22 statement was material to HUD-FHA insuring the twelve loans and the government paid over \$1.6
23 million dollars to Reunion for loans that did not conform with HUD-FHA regulations and should not
24 have been endorsed by Reunion. (ECF No. 10 at 2, 23-27). In sum, the government sufficiently pleaded
25 an implied certification action under against Thayer in his individual capacity and has sufficiently
26 pleaded that Thayer's actions resulted in losses to the United States. The Motion to Dismiss those
27 claims should be denied.
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2. Defendant Thayer Can Be Vicariously Liable for Defendant Reunion's Fraudulent Acts if They Were Committed within the Scope of Employment.

Putting aside Thayer's direct false certifications to HUD that Reunion, as a DEL, fully complied with HUD-FHA guidelines during the period the twelve loans were underwritten and endorsed, Thayer contends he cannot be held liable for Reunion employees' fraudulent acts when they endorsed the twelve loans. (ECF No. 16 at 3-6). This argument also fails.

The Supreme Court has recognized that traditional, vicarious liability can make "principals or employers vicariously liability for the acts of their agents or employees in the scope of their authority or employment." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 756 (1998). A corporate officer, for example, "is, in general, personally liable for all torts which he authorizes or directs, or in which he participates," so long as "he acted as an agent of the corporation and not on his own behalf." Costal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 734 (9th Cir. 1999). The high court explicated in Meyer v. Holley, 537 U.S. 280, 286 (2003), and then remanded Holley v. Crank (Holley I), 258 F.3d 1127 (9th Cir. 2011), back to the Ninth Circuit, ruling that the lower court's holding was a "more extensive vicarious liability" that unconstitutionally "extended traditional vicarious liability rules." In that case, a corporation's sales person allegedly discriminated against buyers in a real estate transaction because of their race. 537 U.S. at 283. The designated broker did not participate in the discriminatory action. Id. The Court rejected the Ninth Circuit's position that a corporate broker could be liable "*solely*" based on the "*right to control* the employee/salesperson." Id. at 291. Notably, the Court did not consider whether "*other* aspects of the California broker relationship, when added to the 'right to control,' would, under traditional legal principals" be consistent with agency law. Id.

The Ninth Circuit answered this question in Holley v. Crank (Holley II), 400 F. 3d 667, 669-671 (9th Cir. 2004). While acknowledging that traditional notions of vicarious liability still apply, the court

1 established that a delegation of responsibility between corporate broker and sales person created an
2 agency relationship, which could make a broker vicariously liable. Id. at 671. Moreover, California
3 Business & Professional Code section 10159.2(a), “makes the designated real estate broker of a real
4 estate corporation personally responsible for the supervision of the corporation’s salespersons.” Id. at
5 671. Given the legislative history of § 10159.2, “direct, personal responsibility” must be placed on the
6 corporation’s designated officer to supervise the employees, as to “assure compliance with the state and
7 federal laws.” Id. at 673. Therefore, an individual broker can be personally liable if a salesperson
8 engaged in misconduct within the scope of employment. Id.

10 In F.D.I.C. v. Cashman, WL 6002611 1 (N.D. Cal. 2011), a Federal Deposit Insurance
11 Corporation sued a realty agency’s salesperson and designated broker for an unpaid loan. The
12 defendants in that case cited Walters v. Marler, 83 Cal. App. 3d 1, 147 (1978), for the proposition that a
13 broker could not be personally liable in civil suit, but could be disciplined for negligence. F.D.I.C. v.
14 Cashman, WL 6002611 1, at p. *3. However, the Cashman court analyzed that because Holley (II) was
15 recently decided, and because the California Business & Professional statute was recently amended, if a
16 salesperson engaged in a tort within the scope of his employment, the designated broker could be
17 vicariously liable. Id.

19 Accordingly, Thayer can be vicariously liable for the actions of Reunion employees. The United
20 States sufficiently pleaded that Thayer possessed a duty to supervise, control, and assure Defendant
21 Reunion’s compliance with federal and state law, establishing an agency relationship between Thayer
22 and Reunion employees. The United States alleges that each of the twelve loans was improperly
23 endorsed and falsely certified by Reunion employees within the scope of their employment.
24 Specifically, Defendant Reunion employees falsely certified to “the integrity of the data” used in the
25 FHA automated underwriting system, as well as claimed to “personally revie[w] the appraisal report . . .
26 credit application, and all associated documents” with “due diligence” despite knowing they did not
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1 comply with HUD FHA standards. (EFC No. 10 at 9). Because of those false statements, HUD FHA
2 insured the twelve loans. (EFC No. 10 at 9). Accordingly, as Reunion's fraudulent actions occurred
3 within the scope of employment, while underwriting, Thayer can be held vicariously liable based upon
4 his duty to supervise, control, and assure Reunion's compliance. The government has sufficiently stated
5 a claim of Thayer's vicarious liability for Reunion's fraudulent actions, which resulted in losses to the
6 United States. Thus, the Motion to Dismiss should be denied.

8 **B. The Common Law Claims Are Not Time-Barred.**

9 Defendants Reunion and Thayer move to dismiss the common law claims against them as time-
10 barred. (ECF No. 16 at 8-10). As an initial matter, the statute of limitations for the government's quasi-
11 contractual claims, including undue enrichment (fourth claim), payment by mistake (fifth claim), and
12 breach of fiduciary duty (sixth claim), is six years and not three as defendants assert. (ECF 16 at 8-9);
13 28 U.S.C. § 2415(a), (b); see U.S. v. McLeod, 721 F.2d 282, 285 (9th Cir. 1983). Therefore, the Motion
14 to Dismiss those claims should be denied.

15 The United States' common law negligence claim is governed by a three-year statute of
16 limitations, 28 U.S.C. § 2415(b), which is tolled for all periods during which "facts material to the right
17 of action are not known and reasonably could not be known by an official of the United States charged
18 with the responsibility to act in the circumstances." 28 U.S.C. § 2416(c). This matter was referred to
19 the U.S. Attorney's Office, the officials charged with bringing this civil lawsuit on behalf of HUD under
20 the FCA and common law, in September 2011. The complaint was filed in May 2013, well within the
21 three-year statute of limitations. (ECF No. 1). In turn, the Motion to Dismiss the negligence claim
22 should be denied.

25 **III. CONCLUSION**

26 For the foregoing reasons, Defendants Thayer and Reunion's Rule 12(b)(6) Motion to Dismiss
27 should be denied in its entirety. The United States has sufficiently pleaded claims of direct and
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1 vicarious liability under the FCA and common law against Defendant Thayer. The common law claims
2 against Defendants Reunion and Thayer are not time-barred.

3 Respectfully submitted,

4 MELINDA HAAG
5 United States Attorney

6 Dated: September 6, 2013

By: _____/s/_____
7 ILA C. DEISS
8 Assistant United States Attorney
9 Counsel for the United States
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