No. 01-1120

In The
Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE PETITIONER

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QUESTION PRESENTED

Under well-established rules of agency and corporate law, a corporate owner or officer will not be held vicariously liable for the torts of his corporation or its other agents merely by virtue of his office. Rather, liability must be founded upon the owner's or officer's own specific acts.

The question presented here is whether, as held by the Ninth Circuit, the criteria for liability under the Fair Housing Act (42 U.S.C. § 3601, *et seq*., "FHA") are different, so that owners and officers of corporations are absolutely liable for an employee's or agent's violation of the Act, whether or not they personally directed, authorized, or were even aware of the particular violations that occurred.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this proceeding are petitioner David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba, Triad Realtors, and respondents Emma Mary Ellen Holley, David Holley, Michael Holley, a minor, and Brooks Bauer, individually and on behalf of the general public.

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The district court's orders granting in part petitioner's motion to dismiss and granting petitioner's motion for summary judgment are not published. These unpublished orders are reprinted in the Joint Appendix ("J.A.") at pages 25-35 and 48-55. The court of appeals' opinion is published at 258 F.3d 1127 (9th Cir. 2001), and is reprinted in the Joint Appendix at pages 57-71. The court of appeals' orders denying rehearing and rehearing en banc and staying mandate are set forth in the Joint Appendix. J.A. 72-74.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on July 31, 2001. A petition for rehearing and rehearing en banc was timely filed, and denied on September 19, 2001. Justice O'Connor subsequently extended the time to file a petition for writ of certiorari to and including February 1, 2002. The petition was filed on January 28, 2002, and granted on May 20, 2002.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

1. The Fair Housing Act of 1968 (FHA), 42 U.S.C. § 3601, *et seq*. The relevant provisions of this statute – §§ 3610, 3612, and 3613 – are reprinted in the Petition Appendix ("Pet. App.") 41-61.

2. Former 24 C.F.R. §§ 103.10-20 (1999). Pet. App. 62-63.

3. Current 24 C.F.R. §§ 103.10-20 (2000). Pet. App. 63-64.

STATEMENT OF THE CASE

A. The Factual Allegations Of The Complaint.[1]

Respondent Emma Mary Ellen Holley is African-American, her husband Respondent David Holley, is Caucasian, and their son, Respondent Michael Holley is African-American. J.A. 3-4. Respondent Brooks Bauer, an individual, is a general contractor residing in Twenty-Nine Palms, California.[2] J.A. 3. Petitioner David Meyer ("Meyer"), an individual, is the alleged owner, president and designated officer/broker of Triad, Inc., dba Triad Realty ("Triad"), a California real estate corporation doing business in Twenty-Nine Palms, California. J.A. 4.

According to the allegations of the complaint, in October 1996, the Holleys visited Triad's office where they met with Triad agent Grove Crank and inquired about listings for new houses in the range of $100,000 to

[1] This appeal arose following the granting in part of Petitioner David Meyer's motion to dismiss. J.A. 25-35. For the purpose of reviewing a motion to dismiss, the properly pled factual allegations of a plaintiff's complaint are presumed to be true. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

[2] The Holleys and Mr. Bauer are referred to collectively as "Plaintiffs."

$150,000. The Holleys alleged that Crank showed them four houses in the area, all priced above $150,000. J.A. 8.

In mid-November 1996, the Holleys located a home on their own that happened to be listed by Triad. In response to the Holleys' inquiry about the home, Triad agent Terry Stump informed them that the asking price for the house was $145,000. The Holleys expressed interest in purchasing the home, offered to pay the asking price, and to put $5,000 in escrow for the builder to hold the house until April or May 1997 when they were to close escrow on the sale of their current home. J.A. 9.

Stump allegedly told the Holleys that their offer seemed fair, as did the builder, Respondent Brooks Bauer, when Mrs. Holley called him with the same offer. Bauer, however advised the Holleys that their offer would have to go through Triad. Later, Stump allegedly called Mrs. Holley to tell her that more experienced agents in Triad's office, one of whom was later identified as Crank, felt that $5,000 was insufficient to get the builder to hold the house for six months. The Holleys decided not to raise their offer and Triad never presented the original offer to Bauer. J.A. 9-11.

One week later, Bauer inquired at Triad about the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys, telling Bauer that he did not want to deal with those "niggers," and called them a "salt and pepper team." The Holleys eventually hired a builder to construct a house for them and Bauer later sold his house for approximately $20,000 less than the Holleys had offered. J.A. 13-14.

B. The Proceedings Below.

1. Plaintiffs' Complaints.

Plaintiffs filed a complaint on November 14, 1997, alleging that Crank and Triad violated federal and state fair housing laws, including the FHA ("the Triad action"). See J.A. 59. They later filed a separate action against Meyer as the officer/broker, president, and owner of Triad, covering the same factual allegations ("the Meyer action"). J.A. 2-24. The District Court consolidated the Triad and Meyer actions. C.R. 10.

Plaintiffs' amended complaint does not allege Meyer participated in, ratified, or even knew of the alleged discriminatory acts of Triad or its agents. Rather, with respect to Meyer, Plaintiffs alleged that he owned Triad and served as its president and designated officer/broker. J.A. 4, 7-8. Plaintiffs alleged that Triad operates under Meyer's broker's license, and that Meyer is the only officer or employee of Triad who holds a broker's license. According to Plaintiffs' allegations, because Meyer is the president and broker of Triad, its agents and employees "ultimately" reported to him. Finally, Plaintiffs alleged that each Triad agent is employed by Triad under Meyer's supervision or direction in his capacity as its broker and president. J.A. 7-8.

2. The District Court Decisions.

Meyer moved to dismiss Plaintiffs' action on the ground it failed to state a claim. See Fed. R. Civ. P. 12(b)(6). The district court granted the motion on all of Plaintiffs' claims, except their FHA claim, on the ground they were barred by the applicable statutes of limitation. J.A. 25-35. Plaintiffs did not appeal this ruling.

With respect to Plaintiffs' FHA claim, the district court granted the motion to dismiss Meyer in his capacity as an officer of Triad, stating that "any liability against Meyer as an officer of Triad would only attach to Triad in that Plaintiffs have not urged theories that would justify reaching Meyer individually." J.A. 31. The district court, however, denied the motion to dismiss Meyer in his capacity as the designated officer/broker of Triad, finding that, under applicable law, "if plaintiffs establish that a discriminatory act took place by an agent who operated under a broker's license held by Meyer as an individual and not as an officer, they could recover against Meyer individually." J.A. 32.

Meyer moved for summary judgment on Plaintiffs' remaining claim. See Fed. R. Civ. P. 56(c). In support of his motion, Meyer submitted evidence that he had not held a broker's license as an individual since the early 1980's, i.e., well before the incidents alleged in Plaintiffs' complaint. Joint Appendix Lodging ("J.A.L.") 3. From August 1994 through August 1998, Triad was a corporate licensee, with Meyer designated as Triad's officer/broker. Meyer's broker's license was thus valid only as an officer of Triad. J.A.L. 3-4, 8.

From April 1994 through April 1998, Triad was Crank's exclusive employing broker. J.A. 40; J.A.L. 10-11. Indeed, during the relevant period each of the agents in the office were acting under Triad's corporate license, and not under a license held by Meyer as an individual. J.A. 40.

Plaintiffs did not address or present evidence on the relevant issue on summary judgment as framed by the district court, i.e., the status of Meyer's license. Instead,

Plaintiffs argued that the court had misread the law regarding personal liability of principals for the unlawful acts of their agents under the FHA.[3] J.A. 53-54. Plaintiffs submitted selected excerpts of Meyer's deposition in which he stated he "understood" his responsibilities as the designated officer/broker at Triad to include making sure that Triad's agents "were acting lawfully, that contracts were negotiated lawfully, . . . [and] that people were treated lawfully." J.A.L. 134-35.

Plaintiffs' evidence, however, also established that while Meyer had been the sole stockholder of Triad, he transferred all of his ownership interest to Crank in February 1995. From that point on, Crank became the office manager and took over the day-to-day running of the business. J.A.L. 121-36. Though Meyer would meet with Crank about once a month to discuss corporation business, Meyer no longer had responsibility for monitoring Triad's daily activities.[4] J.A.L. 137.

The district court granted Meyer's motion for summary judgment. The court found that during the time relevant to this case, Triad, not Meyer, was the licensed broker. Accordingly, Crank's contractual relationship was

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[3] The district court correctly found that Plaintiffs' opposition was framed as an improper motion for reconsideration of the court's prior order granting in part and denying in part Meyer's motion to dismiss. J.A. 53-54; see *Hopkins v. Andaya*, 958 F.2d 881, 887 n. 5 (9th Cir. 1992).

[4] The court of appeals found there to be a question of fact and credibility, and remanded to the district court to determine whether Meyer owned Triad at the time at issue. J.A. 65. Accordingly, Meyer will explain why, assuming he was the owner of Triad, he still has no liability, and therefore remand is unnecessary.

with Triad. Thus, Crank's alleged discriminatory acts were imputed to Triad, not to Meyer as an individual. "Hence, Meyer cannot be held personally responsible for Crank's alleged misconduct." J.A. 54-55; see *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 629 F. Supp. 1232, 1303 (N.D. Ohio 1983), *rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985).

The district court entered judgment for Meyer. J.A. 56.

3. The Court Of Appeals' Decision.

The Court of Appeals for the Ninth Circuit reversed in a published decision. The court acknowledged that "under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action." J.A. 58. The court further acknowledged that "the evidence does not indicate that Crank acted with the approval or at the direction of Meyer." J.A. 66. However, the court held "the criteria for the Fair Housing Act [are] different as liability is specified for those who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling." J.A. 58. Additionally, the court of appeals found Meyer could be personally liable based on its interpretation of the FHA as imposing a "nondelegable" duty not to discriminate. J.A. 63. Finally, the court of appeals held its "harsh" result was justified by the policy of the FHA. J.A. 62-63.

On these bases, the court therefore concluded Meyer could be personally liable for Crank's conduct based solely on Meyer's status as the owner and officer of Triad. J.A. 71.

SUMMARY OF ARGUMENT

Under well-settled principles of common law, corporate owners and officers are not vicariously liable for the torts of the corporation or its other agents. Rather, liability must be founded upon the owner's or officer's own specific acts. The court of appeals acknowledged this law, as well as the absence of any evidence in this case that Crank, Triad's sales agent, acted with Meyer's knowledge or approval. The court of appeals instead read the FHA as imposing vicarious liability, based solely on a corporate owner's or officer's right of control, and on an interpretation of the FHA as imposing a "nondelegable" duty not to discriminate. The court of appeals' conclusions are based on an erroneous reading of the FHA, the HUD regulations, and the case law, and conflict both with authority from this Court and other lower courts.

First, the language of the FHA gives no indication Congress intended to abrogate or enlarge the common law governing the corporate form and liability. By reading the FHA to impose vicarious liability on corporate owners and officers, the court of appeals thus enlarged the statute so that what was omitted – an explicit provision altering the liability of corporate owners and officers under the common law – would be included within its scope. This far exceeded the proper judicial function. As the Court has held, the failure of a statute to speak to a matter as fundamental as the liability implications of corporate ownership "demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Bestfoods*, 524 U.S. 51, 63, 118 S.Ct.

1876, 1885 (1998). This "congressional silence" in the FHA concerning deviations from common law rules of liability is "dispositive." *Id.*, at 70.

Nor can the court of appeals' expansionist reading of the FHA be supported by the HUD regulations on which it relied. This is so for several reasons. The court of appeals relied on a pre-amended version of 24 C.F.R. § 103.20 (1999), which provided that an administrative complaint could be filed against any person who "has the right to direct or control the conduct of another person" if that other person "acting within the scope of his of her authority as employee or agent of the directing or controlling person" has engaged in a discriminatory housing practice. The court of appeals' elevation of this administrative regulation – which no longer existed at the time the court of appeals relied upon it – to the level of controlling law was error.

Second, the court of appeals' expansionist reading of the FHA cannot be supported on the alternate basis relied on by the court, i.e., that the duty not to discriminate under the FHA is "nondelegable." The court of appeals' insertion of a nondelegable duty into the text of the FHA conflicts with authority of this Court, holding that civil rights statutes do not impose a nondelegable duty. See *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 396, 102 S.Ct. 3141, 3153 (1982) (interpreting 42 U.S.C. § 1981). The text of the FHA itself imposes no such duty, and, like a theory of vicarious liability based on a right of control, should not be read into the statute by the courts. *United States v. Bestfoods*, *supra*, 524 U.S. at 63, 118 S.Ct. at 1885.

Third, to impose liability on Meyer as an officer/broker of Triad under the FHA, the court of appeals relied on California's statutory scheme for the licensing and discipline of designated officer/brokers. That state statutory scheme, which extends a disciplinary scheme rather than creating a private right of action, cannot be used to create liability under the FHA.

Fourth, the court of appeals believed its expansion of liability was warranted by the policy underlying the FHA to provide a remedy to those who are the victims of discrimination in housing. No such expansion of the law is necessary to serve that purpose. Under established law, victims of housing discrimination have a remedy against both the agent who allegedly violated the FHA, as well as the agent's principal, the corporation. No further purpose is served by allowing plaintiffs to proceed personally against an innocent owner or officer of the corporation, who neither participated in, nor authorized or ratified, the agent's conduct. Such a quest for an imagined "deep pocket" is repugnant, and in no way furthers the actual laudable policy underlying the FHA.

Indeed, public policy demands that liability of corporate owners and officers not be expanded. By holding corporate owners and officers liable for the conduct of the corporation's agents, whether or not they directed, authorized, or even knew of the particular discriminatory act, the court of appeals' decision has, without exaggeration, opened the floodgates of litigation throughout the country, and rendered the very purpose of the corporate structure nugatory. Such a holding is not in the interests, and should not be the law, of this nation.

ARGUMENT

I. THE FHA SHOULD NOT BE READ TO IMPOSE VICARIOUS LIABILITY ON CORPORATE OWNERS AND OFFICERS BASED SOLELY ON THEIR RIGHT OF CONTROL.

A. Common Law Rules Governing Corporate Form And Liability Control Absent A Specific Contrary Indication From Congress.

The court of appeals recognized that under general principles of tort law, corporate shareholders and officers are not held vicariously liable for the actions of the corporation or its other agents. It held, however, that the criteria under the FHA are different, "as liability is specified for those who direct or control or have the right to direct or control the conduct of another" with respect to the sale of a dwelling. J.A. 58.

In reaching its conclusion that the criteria for liability under the FHA are different than under general principles of tort law, the court of appeals did not rely on the text of the FHA, which neither "specifies" nor purports to expand the class of persons who can be sued for alleged discriminatory housing practices. Rather, the court assumed that Congress silently swept away that aspect of existing common law relating to the limited liability of corporate owners and officers, inserting in its place vicarious liability based solely on the owner's or officer's right of control. What the court did, therefore, was "not a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted" – an explicit provision altering the liability of corporate owners and officers – "may be included within its scope." *W. Va. Univ. Hosp., Inc. v. Casey,* 499 U.S. 83, 101, 111 S.Ct. 1138, 1148 (1991)

(quoting *Iselin v. United States*, 270 U.S. 245, 250-51, 46 S.Ct. 248, 250 (1926) (Brandeis, J.). However, "[t]o supply omissions transcends the judicial function." *Ibid*.

This is especially true when the omission relates to the well-established body of state corporate law. As the Court held in *Burks v. Lasker,* 441 U.S. 471, 477-78, 99 S.Ct. 1831, 1836-37 (1979):

> It is true that in certain areas we have held that federal statutes authorize the federal courts to fashion a complete body of federal law. [Citation.] Corporation law, however, is not such an area. . . . [I]n this field congressional legislation is generally enacted against the background of existing state law; Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute. See also *United States v. Bestfoods, supra,* 524 U.S. at 63, 118 S.Ct. at 1885.

This omission of the FHA to speak to a matter as fundamental as the vicarious liability of corporate owners and officers demands application of the rule that "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 1634 (1993) (internal quotation marks omitted); see *United States v. Bestfoods, supra*, 524 U.S. at 62-63, 118 S.Ct. at 1885-86 (CERCLA cannot be read to abrogate state corporation law unless it speaks directly to the issue, which it does not); see also *Imbler v. Pachtman*, 424 U.S. 409, 417-18, 96 S.Ct. 984 (1976) (federal civil rights statute did not abrogate general tort immunities; instead it must be interpreted in light of the immunities).

Congressional silence is "dispositive." *United States v. Bestfoods, supra,* 524 U.S. at 70, 118 S.Ct. at 1889.

Congress has not been oblique when it has imposed some version of a "control" test as a replacement for the traditional standards governing vicarious liability. For example, the Securities Exchange Act of 1934 expresses the issue in these terms:

> Every person who, directly or indirectly, controls any person liable under the provisions of this chapter . . . shall also be liable jointly and severally with and to the same extent as such controlled person. 15 U.S.C. § 78(t)(a).

Similarly, in the context of antitrust law, Congress has directly specified the personal liability of corporate owners and officers for acts of the corporation. 15 U.S.C. § 24 provides in relevant part:

> Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation. . . .

Clearly, "[w]hen Congress wished to create such [secondary] liability, it had little trouble doing so." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 184, 114 S.Ct. 1439, 1452 (1994). Congress has demonstrated no such expansionist intent in the FHA. It should not be read into the statute by the courts. *W. Va. Univ. Hosp., Inc. v. Casey, supra,* 499 U.S. at 101, 111 S.Ct. at 1148; *United States v. Bestfoods, supra,* 524 U.S. at 70, 118 S.Ct. at 1889 ("[C]ongressional silence

concerning deviations from the common law is "dispositive").

B. Under The Common Law, Corporate Owners And Officers Are Not Vicariously Liable For The Torts Of The Corporation Or Its Other Agents.

1. Corporate Officers Are Not Vicariously Liable For The Torts Of The Corporation Or Its Other Agents.

The rule of limited liability for corporate officers has its roots in the common law of agency. "As an inanimate entity, a corporation must act through agents." *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 1991 (1985); *Braswell v. United States*, 487 U.S. 99, 110, 108 S.Ct. 2284, 2291 (1988). Officers are the agents of the corporate principal, and their liability to third persons is governed by the ordinary principles of agency. 3A Fletcher, Cyc. Corp. § 1135 (Perm. Ed.).

It follows as a fundamental tenet of corporation law that a corporate officer will not be held vicariously liable, merely by virtue of his office, for the torts of his corporation or its other agents. See 3A Fletcher, *supra*, § 1137 ("[A]n officer who takes no part in the commission of the tort is not personally liable to third persons for the torts of other agents, officers or employees of the corporation"). Rather, liability must be founded upon specific acts by the individual officer. "[M]erely being an officer or agent of a corporation does not render one personally liable for a tortious act of the corporation. Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which

operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation. [Citations.]" *Lobato v. Pay-Less Drug Stores*, 261 F.2d 406, 409 (10th Cir. 1958); see also *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1144 (4th Cir. 1975); *Escudo Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 907 (1st Cir. 1980); *Murphy Tugboat v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 852 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256, 1263 (9th Cir. 1981), *cert. den.*, 455 U.S. 1018 (1982); *Teledyne Indus., Inc. v. Eon Corp.*, 401 F. Supp. 729, 736-37 (S.D.N.Y. 1975), *aff'd*, 546 F.2d 495 (2nd Cir. 1975); *Frances T. v. Village Green Owners Ass'n*, 42 Cal.3d 490, 503-04 (Cal. 1986); 18B Am.Jur.2d, Corporations, §§ 1877-78; 3A Fletcher, *supra*, § 1137.

Cases which have found personal liability on the part of corporate officers have typically involved instances of direct personal participation, as where the defendant was the "guiding spirit" behind the wrongful conduct (*Marks v. Polaroid Corp.*, 237 F.2d 428, 435 (1st Cir. 1956)), or the "central figure" in the challenged corporate activity (*Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 605-06 (3d Cir. 1978)). The following example given by the Seventh Circuit is illustrative:

> If an individual is hit by a negligently operated train, the railroad is liable in tort to him but the president of the railroad is not. Or rather, not usually; had the president been driving the train when it hit the plaintiff, or had been sitting beside the driver and ordered him to exceed the speed limit, he would be jointly liable with the railroad. *Browning-Ferris Indus. of Ill., Inc. v. Ter Maat*, 195 F.3d 953, 956 (7th Cir. 1999).

Those courts which have expressly considered the issue have, consistent with the common law, underscored the need for a corporate owner's or officer's participation in the tort of the corporation or its agents in order for liability to adhere under the FHA and other civil rights statutes. *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1045 (N.D. Ohio 1998); *Heights Cmty. Cong. v. Hilltop Realty, Inc., supra,* 629 F. Supp. at 1303-04; see *Tillman v. Wheaton-Haven Recreation Ass'n, supra,* 517 F.2d at 1144 (42 U.S.C. §§ 1981, 1982).

For example, in *Hilltop, supra,* 629 F. Supp. 1232, the court found a realty corporation vicariously liable for the discriminatory conduct of its agents in violation of the FHA. *Id*., at 1303. The court, however, found that the corporation's president and chief operating officer could not be held liable for the agents' conduct based on his status as a corporate officer. The court explained, "[Mr. Aveni's] status as president and chief operating officer in and of itself does not render him personally liable for the acts of the corporation or its agents or employees. [Citations.] To impose vicarious liability upon Mr. Aveni as president and chief operating officer for the acts of the Hilltop agents who participated in the continuing violation found by this court, it is essential to show that he participated in their acts or knew of and ratified their acts and statements." *Id*., at 1304, footnote omitted.

Similarly, in *United States v. Lorantffy Care Center, supra,* 999 F. Supp. 1037, the court dismissed the individual corporate officers in an action brought under the FHA on the ground they had not participated in the tort of the corporation. The court held, "no individual may be held vicariously liable for a company pattern or practice simply because she is an officer or manager of the company. In

Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974), the Sixth Circuit did find that a company is liable for the acts and statements of its employees. But in that decision, and those within the Circuit that follow it, *courts apply the doctrine of vicarious liability to the company, not the company's officers*. [Citation]." 99 F. Supp. at 1045, emphasis added.

This interpretation of the FHA is consistent with the manner in which courts have read related civil rights statutes. For example, in *Tillman v. Wheaton-Haven Recreation Ass'n, supra*, 517 F.2d 1141, the Fourth Circuit was called upon to address the liability of corporate owners and officers under 42 U.S.C. §§ 1981 and 1982.[5] The question was whether the officers' status shielded them from liability under these statutes. *Tillman, supra,*

[5] The statutes provide in pertinent part:

42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

"[T]he Fair Housing Act and § 1982 stand as independent statutory remedies available to black plaintiffs against persons who refuse to sell them property because of their race." *Dillon v. AFBIC Dev. Corp.*, 597 F.2d 556, 561 (5th Cir. 1979).

517 F.2d at 1143. The court took as its starting point this Court's construction of 42 U.S.C. § 1983.[6] "[T]he Supreme Court held that § 1983, though cast in absolute terms, did not abolish the common law immunities granted some public officials in the performance of their duties." *Ibid*, citing *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Tenney v. Bandhove,* 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); see also *Imbler v. Pachtman, supra,* 424 U.S. at 417-18, 96 S.Ct. 984, 47 L.Ed.2d 128. "In short, the Court interpreted § 1983 as neither enlarging nor diminishing traditional immunities of public officials." *Tillman, supra,* 517 F.2d at 1143.

"Comparably, §§ 1981 and 1982 should be interpreted as neither enlarging nor diminishing the liability of directors under general corporation law for tortious acts performed nominally by the corporation." *Tillman, supra,* 517 F.2d at 1144. Thus, if a corporate owner or officer "does not personally participate in the corporation's tort, general corporation law does not subject him to liability simply by virtue of his office." *Ibid.*

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[6] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. The Owner Of A Corporation Is Not Liable For The Acts Of His Corporation Unless The Record Justifies Piercing The Corporate Veil.

Stockholders of a corporation are not liable for the acts of their corporation unless the record justifies piercing the corporate veil. *United States v. Bestfoods, supra,* 524 U.S. at 62-63, 118 S.Ct. at 1885; *Export Credit Corp. v. Diesel Auto Parts Corp.*, 502 F. Supp. 207 (S.D.N.Y. 1980); 18B Am.Jur.2d, Corporations, § 1829 (1985). The same rule applies in actions brought under the FHA. *Heights Cmty. Cong. v. Hilltop Realty, Inc., supra,* 629 F. Supp. at 1303, fn. 102.

The Court recently cautioned that "[o]ne-person corporations are authorized by law and should not lightly be labeled sham." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 471, 120 S.Ct. 1579, 1587 (2000). Thus, sole ownership of a corporation does not alone justify piercing the corporate veil and imposing personal liability.[7] *Williams v. McAllister Bros., Inc.*, 534 F.2d 19, 21 (2nd Cir. 1976).

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[7] Plaintiffs have made no claim that the corporate veil should be pierced, nor did they offer any evidence to support such a claim. Accordingly, the Court does not need to determine whether the relevant factors have been satisfied, or whether the "alter ego" elements have been met. See *Bucyrus Erie Co. v. General Products*, 643 F.2d 413, 418 (6th Cir. 1981); *United States v. Pisani*, 646 F.2d 83, 85 (3d Cir. 1981); *Heights Community Congress v. Hilltop Realty, Inc., supra,* 629 F. Supp. at 1303, fn. 102.

C. The Former HUD Regulation Relied On By The Court Of Appeals Does Not Support Imposition Of Vicarious Liability Under The FHA.

The court of appeals relied on a repealed HUD regulation for the investigation and conciliation of administrative complaints to support its expansionist reading of the FHA. J.A. 60-61. Specifically, the court relied on former, and now amended, 24 C.F.R. § 103.20(b) (1999) which provided in relevant part that "[a] complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale . . . of dwellings." Pet. App. 63. Section 103.20, however, is no longer in effect. The regulation was amended prior to the court of appeals' decision to completely abolish any reference to liability of "any person" with "the right to direct or control the conduct of another person" with respect to housing as subject to a claim, and in so doing eliminated the very language relied on by the court of appeals to support its decision. 24 C.F.R. § 103.10 (2000); see also 24 C.F.R. §§ 103.15-20. Pet. App. 63-64.

Moreover, even if the Court were to look to the former HUD regulation for guidance (see *Gladstone Realtors v. Vill. of Bellwood,* 441 U.S. 91, 105-08, 99 S.Ct. 1601 (1979)), the court of appeals' elevation of the regulations to the level of expanding the common law was improper. To alter common law rules of limited liability requires a clear statement from Congress. *United States v. Bestfoods, supra,* 524 U.S. at 63, 118 S.Ct. at 1885. An administrative agency is powerless to effect that change through regulations, especially in the face of congressional silence. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, ___ U.S. ___,

122 S.Ct. 1864, 1882 (2002) (administrative agency "is not, constitutionally speaking, either a legislature or a court").

Indeed, the HUD regulations at issue expressly apply only to the procedure for investigation and conciliation of administrative complaints. 24 C.F.R. § 103.1.[8] They do not purport to expand civil liability. See *Walker v. Crigler,* 976 F.2d 900, 904 (4th Cir. 1992) (HUD regulations "do not cover the circumstances of the present case which is a private cause of action and not a complaint filed with HUD" [interpreting former § 103.20]). Nor could they. See *Fed. Mar. Comm'n v. S.C. State Ports Auth., supra,* 122 S.Ct. at 1882.

Finally, at the very most, the regulation (when it was in effect), addressed imposition of vicarious liability against *principals*. That is simply irrelevant to the question whether a corporate owner's or officer's limited liability under the common law can be disregarded based on actions of the corporation or its other agents.

II. PERSONAL LIABILITY OF CORPORATE OWNERS AND OFFICERS UNDER THE FHA CANNOT BE PREMISED ON THE THEORY OF A NONDELEGABLE DUTY.

A. The Concept Of Nondelegable Duty.

In *General Building Contractors Association v. Pennsylvania, supra,* 458 U.S. at 395, 102 S.Ct. at 3152-53, the

[8] 24 C.F.R. § 103.1 provides in relevant part:

(a) This part contains the procedures established by the Department of Housing and Urban Development for the investigation and conciliation of complaints under section 810 of the Fair Housing Act, 42 U.S.C. § 3610.

Court described the concept of a nondelegable duty as imposing "upon the principal not merely an obligation to exercise care in his own activities, but to answer for the well-being of those persons to whom the duty runs." See Rest (2d) Torts, § 214.[9] "The duty is not discharged by using care in delegating it to an independent contractor. Consequently, the doctrine creates an exception to the common-law rule that a principal will not be liable for the tortious conduct of an independent contractor. [Citations.] So understood, a nondelegable duty is an affirmative obligation to ensure the protection of the person to whom the duty runs." *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 395-96, 102 S.Ct. at 3152-53.

The question presented is whether, as held by the court of appeals, the FHA imposes such an affirmative obligation on corporate owners or officers to prevent discrimination. Because the FHA in fact imposes no such duty, corporate owners and officers cannot be held personally liable simply because another agent of the corporation discriminates against a third party. They can only be liable for personal acts that are prohibited by the statute.

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[9] Restatement Second Torts § 214 provides:

> A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.

B. The Court's Interpretation Of Related Civil Rights Statutes Has Rejected Imposition Of A Nondelegable Duty To Ensure Discrimination Does Not Occur.

In *General Building Contractor's Association v. Pennsylvania, supra,* 458 U.S. 375, 102 S.Ct. 3141, the Court decided a Title VII employment discrimination case under 42 U.S.C. § 1981.[10] The case was brought by a group of skilled, racial minority workers alleging exclusive hiring practices by a labor union, several trade associations, and member construction employers. 458 U.S. at 378. The plaintiffs alleged the union hiring hall systematically denied access to minority workers in favor of white workers. The complaint also alleged derivative liability of the trade association and individual employers for the union's discriminatory practices. 458 U.S. at 377, 380. The district court found the union's practices were discriminatory, holding the union liable and summarily imputing its illegal practices to the other defendants. 458 U.S. at 381.

In its opinion, the Court first discussed third party liability under respondeat superior and agency law. The Court determined there was no agency relationship between the trade association and the union because the union was not subject to the association's power to control. *Id.*, at 393-94.

The Court then addressed, and rejected, nondelegability, which was the alternative basis relied on by the district court as a basis for liability. The Court's inquiry focused on what duty the statute imposes:

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[10] For text of 42 U.S.C. § 1981 see footnote 5, *supra*.

> In a sense, to characterize . . . a duty as "non-delegable" is merely to restate the duty. Thus, in this litigation the question is not whether the employers and associations are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is *what* duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to ensure that blacks enjoy such right? *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 396, 102 S.Ct. at 3153 (original emphasis).

To answer this question, the Court looked to the language of the statute:

> The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United States." *Id.*, at 396.

The Court concluded § 1981 imposes no such affirmative obligation to ensure that discrimination does not occur:

> We are confident that the Thirty-Ninth Congress meant to do no more than prohibit employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. It did not intend to make them the guarantors of the workers' rights as against third parties who would infringe them. [Citations.] *Id.*, at 396.

Although *General Building Contractors* arose under § 1981 and not the FHA, substantially the same analysis should apply to both. While § 1981 was enacted to prohibit discrimination in the making and enforcement of contracts, its companion, § 1982, applies to housing law.[11] The Court in *General Building Contractors* noted the close connection between the two statutes, including their common origin and evolution. *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 383-84 (indicating the common roots of §§ 1981 and 1982 in the Civil Rights Act of 1866).

Similarly, § 1982 and the FHA are often construed together, and most actions brought under the FHA are litigated under § 1982 as well. See, e.g., *City of Chicago v. Matchmaker Real Estate Sales Ctr.,* 982 F.2d 1086, 1096 (7th Cir. 1992); *Hamilton v. Svatik*, 779 F.2d 383, 385 (7th Cir. 1985); *Marr v. Rife, supra,* 503 F.2d at 736; *Dillon v. AFBIC Dev. Corp., supra,* 597 F.2d at 561-62. Indeed, so close are the similarities that courts often construe the two acts together, treating them as "independent statutory remedies available to black plaintiffs against persons who refuse to sell them property because of their race." *Dillon v. AFBIC Dev. Corp., supra,* 597 F.2d at 561; see also *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 416 and note 20, 88 S.Ct. 2186 (1968) (rejecting suggestion that the enactment of the FHA impliedly repealed or modified § 1982).

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[11] See footnote 5, *supra*.

C. The Text Of The FHA Does Not Reveal A Congressional Intent To Impose A Nondelegable Duty.

As explained by the Court in *General Building Contractors Association*, a determination of whether a statute imposes a nondelegable duty turns on the language of the statute. More precisely, what duty does the statute impose? *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 396, 102 S.Ct. at 3153. The FHA provides:

> [I]t shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. 42 U.S.C. § 3604(a).

The language of the statute does not speak in terms of "duties." See *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 396, 102 S.Ct. at 3153. The text does not mention the word "owner" or "officer" or any person at all. Instead, the focus of the FHA is on prohibitions, not affirmative duties. Moreover, the statute on its face does not state or even imply that the owner or officer of a corporation has an affirmative obligation to ensure nondiscrimination in the sale or rental of property. Cf., *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra,* 458 U.S. at 396, 102 S.Ct. at 3153 (under § 1981, Congress "did not intend to make [employers] the guarantors of the worker's rights as against third parties who would infringe them"). Indeed, the FHA states no particular affirmative obligations at all. It only prohibits particular acts. Consequently, the nondelegability concept has no application. *Ibid.*; see also Joshua W. Dixon, Comment, *The Case Against a*

Nondelegable Duty on Owners to Prevent Fair Housing Violations, 69 U. Chi. L. Rev. 1293, 1307-09 (2002).

D. The Former HUD Regulation Relied On By The Court Of Appeals Does Not Support Imposition Of A Nondelegable Duty Under The FHA.

The pertinent HUD regulations for the investigation and conciliation of administrative complaints were discussed above. See Sec. I, C, *supra*. As relevant here, the regulation relied on by the court of appeals limited actions against principals and employers to situations where the discriminating subordinate was "acting within the scope of his or her authority as employee or agent of the directing or controlling person." See former 24 C.F.R. sec. 103.20(b)(1999); Pet. App. 63. By using "scope of authority" as a controlling factor, and rejecting a proposed version of the regulation which omitted this language, HUD clarified that traditional principles of agency, rather than strict liability based on a nondelegable duty, would apply to FHA cases. See *Walker v. Crigler*, *supra*, 976 F.2d at 907, citing 53 Fed. Reg. 24185 (1988), added emphasis ("*it is not HUD's intent to impose absolute liability on any principal*"); J. Dixon, *op. cit.* at 1293 ("[I]t would be anomalous to read the standard of liability in civil FHA claims to be a nondelegable duty while reading the standard in administrative claims to be agency principles").

III. THE COURT OF APPEALS IMPROPERLY RELIED ON STATE LAW FOR REGULATION OF OFFICER/BROKERS TO CREATE LIABILITY UNDER THE FHA.

To impose liability on Meyer as an officer/broker of Triad under the FHA, the court of appeals relied on California's statutory scheme for the licensing and discipline of designated officer/brokers.[12] J.A. 67-71. That state statutory scheme, which extends a disciplinary scheme rather than creating a private right of action, cannot be used to create liability under the FHA.

First, the state statutory scheme cannot be used to create substantive federal liability without direction from Congress. "[A]lthough Congress may have assigned to the process of judicial implication the task of selecting in any particular case appropriate rules from state law to supplement established federal law, the application of that process is restricted to those contexts in which Congress has in fact authorized resort to state and common law." *Moor v. Alameda County,* 411 U.S. 693, 701-702, 93 S.Ct. 1785, 1791-1792 (1973). This is not such a case.[13]

Second, even if the Court were to look to state law to create liability under the FHA, the California statute

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[12] Meyer has not held a broker's license as an individual since the early 1980's, i.e., well before the incidents alleged in Plaintiffs' complaint. J.A.L. 3. At all relevant times, Triad was a corporate licensee, with Meyer designated as Triad's officer/broker. J.A.L. 3-4, 8.

[13] The Court gave the Federal Tort Claims Act, "under which the United States is made liable for certain torts of its employees under relevant state law," as an example of such federal adoption of state law. *Moor v. Alameda County, supra,* 411 U.S. at 701, fn. 11.

provides no such basis. California Business and Professions Code section 10159.2 provides in relevant part:

> The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

This statute does not create a private right of action against an individual based solely upon his status as a designated broker. Rather, section 10159.2 is intended

> "to include only disciplinary sanctions on the individual broker. Nothing in the statutory scheme of the Real Estate Act, or the plain language of § 10159.2, suggests that it creates a private right of action against the designated broker, particularly in light of detailed provisions for disciplinary sanctions set forth in §§ 10175-10185. The most obvious interpretation of § 10159.2 is that it simply extended this disciplinary scheme to apply against designated brokers who failed to properly supervise employees. [Citation.]"

In re Grabau, 151 B.R. 227, 332 (1993); see also *Walters v. Marler*, 83 Cal.App.3d 1, 35 (1978) ("Any action by the qualifying broker . . . must be regarded as an action by the corporation and not by the broker as an individual").

Third, the court of appeals' opinion holding an officer/broker personally liable under the FHA conflicts with authority from other circuits holding that an individual is not personally liable based on that status. *Heights Community*

Congress v. Hilltop Realty, Inc., supra, 629 F. Supp. at 1303. In *Hilltop*, the court held that a licensed broker, in that case a corporation, was "liable for the imputed acts and statements" of those agents operating under the corporation's license in violation of the FHA. 629 F. Supp. at 1303. The plaintiffs also sought to attach personal liability to the owner/president of the corporation. The court held that, since the agents who committed the discriminatory acts had a "contractual relationship with [the corporation] as broker and not with [the owner/president] as broker, [the agent's] acts and statements could not be imputed to [the owner/president]." *Id.*, at 1303-04.

So too here, Meyer – who did not hold an individual broker's license – cannot be held liable based on his status as Triad's designated officer/broker.

IV. THE COURT OF APPEALS' EXPANSION OF LIABILITY IS NOT WARRANTED BY THE POLICY UNDERLYING THE FHA TO PREVENT DISCRIMINATION IN HOUSING.

The declared policy of the FHA is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The Fourth Circuit interpreted this policy as indicating that "the one innocent party with the power to control the acts of the agent, the owner of the property or other responsible superior, must act to compensate the injured party for the harm, and to ensure that similar harm will not occur in the future." *Walker v. Crigler, supra,* 976 F.2d at 904-05; accord, *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., supra,* 982 F.2d at 1096-97.

The court of appeals relied on this language as providing the policy justification for its holding that corporate owners and officers may be liable for an employee's violation of the FHA, whether or not the owners or officers directed, authorized, or even knew of the particular acts that occurred. JA 62-63. It does not provide such a policy justification.

Plaintiffs who are victims of alleged violations of the FHA are not without recourse under established principles of agency and corporate law. They can pursue their action against the agent who is directly liable for the alleged discrimination, as well as against the "one innocent party with the power to control the acts of the agent," i.e., the corporation. No legitimate policy is furthered by allowing plaintiffs to pursue an innocent officer/owner as well. To the contrary. Allowing plaintiffs to proceed against an innocent corporate owner or officer simply because he is a perceived "deep pocket" is inimical to notions of fair play and substantial justice, and in no way furthers the actual laudable policy underlying the FHA or the victim's legitimate right to recovery.

Indeed, public policy favors an adherence to common law rules governing corporate form and liability. While this case involves a small real estate company with perhaps five sales agents, the same corporate structure governs many real estate firms, from tiny "Mom and Pop" operations to corporate giants that may hire thousands of agents nationwide. For example, in California alone, there are more than 15,000 corporate real estate broker licenses, and just over 17,000 individuals licensed as corporate broker/officers. A full 45 percent of all real estate sales persons in the state work for these corporate brokers. (See

Brief of *amicus curiae* California Association of Realtors in support of petition for writ of certiorari at 5.)

Now, unless the court of appeals' opinion is corrected by this Court, each owner and officer can be *personally* liable for the acts of all those agents. What sane individual would take on that responsibility? Yet without officers and owners, none of these real estate corporations could continue to function. The results will be catastrophic. See *Anderson v. Abbott*, 321 U.S. 349, 361-62, 62 S.Ct. 531, 537-38 (1944) ("[T]he corporation is an insulator from liability from creditors. . . . Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.")

By holding a corporate owner or officer personally liable for the conduct of the corporation or its other agents, whether or not the individual directed, authorized, or even knew of the particular discriminatory conduct, the court of appeals' decision has, without exaggeration, opened the floodgates of litigation throughout the country. Such a holding is not in the interests, and should not be the law, of this nation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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