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

REPLY BRIEF OF THE PETITIONER

BROWN & PEEL
JAMES W. PEEL
3585 West Beechwood
Suite 101
Fresno, California 93711
(559) 431-1300

BENEDON & SERLIN
DOUGLAS G. BENEDON*
GERALD M. SERLIN
21700 Oxnard Street,
Suite 1290
Woodland Hills, California
91367
(818) 340-1950
*Counsel of Record

Attorneys for Petitioner
David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Plaintiffs, and their *amici*, distance themselves conspicuously from both the reasoning and broad holding of the Ninth Circuit. They make no argument that a corporate owner or officer is absolutely liable for an employee's or agent's violation of the Fair Housing Act ("FHA" or "Act"). Nor do they argue that liability can be imposed based on a "nondelegable duty" under the FHA. Instead, Plaintiffs suggest the following "rule" should be adopted by the Court in every action under the Act: "[A] corporation's officer/broker, charged under state licensing law with the duty to supervise and control the licensed activities of corporate salespersons, is liable for the FHA violations committed by those salespersons acting under the corporation's license." Brief of Respondents ("Resp. Br.") 10.

Plaintiffs' proposed rule, however, like the decision of the Ninth Circuit, imposes absolute liability based on a "right of control" under state law rather than established common-law principles of agency and corporate law. Consequently, Plaintiffs' proposed rule, like the decision of the Ninth Circuit, cannot withstand scrutiny.

ARGUMENT

I.

A CORPORATE OFFICER/BROKER IS NOT VICARIOUSLY LIABLE FOR VIOLATIONS OF THE FHA BY THE CORPORATION'S AGENTS AND EMPLOYEES.

A. Under The Common Law, A Corporate Officer Is Not The Principal Of The Corporate Employees Under His Control And Supervision.

1. Agency under the common law is not based solely on the right of control. According to Plaintiffs, "Meyer's statutorily mandated duty to control the activities of Triad salespersons defines the agency relationship between them. . . . [A]ll that is needed is the right to control." Resp. Br. 23 (emphasis omitted). Control, alone, however, is not enough to establish an agency relationship under the common law. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392 (1982) (quoting Restatement (Second) Agency § 1 (1957)). Agency is thus comprised of two components: (1) consent "to act on . . . behalf" of another person *and* (2) subject to his control. Control alone is insufficient.

2. A corporate employee or agent acts on behalf of the corporation, not the supervising officer. Under the above common-law definition of agency, the corporate entity constitutes the principal, and the officers and supervisors are agents of the principal, as are the subordinate employees. 3A *Fletcher*, *Cyclopedia of Corporations* § 1135 (Perm.Ed.) This is so because an individual corporate

officer or supervisor may have the authority to direct or control a subordinate employee on behalf of the corporation, but the subordinate employee does not stand in a "fiduciary relation" to the officer or supervisor or act "on his behalf." Rather, the subordinate stands in a fiduciary relationship to the corporate employer itself, on whose behalf he acts, rather than to any individual within the corporate hierarchy.[1]

Thus, while the corporation can be vicariously liable under a theory of respondeat superior (see, *e.g., Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 761 (1998)), a supervising officer or employee cannot:

> The words 'respondeat superior' imply that the doctrine is one of superior officer's liability, but it isn't; it is a doctrine about employers and . . . other principals. It has no application to a case where A, B's supervisor, is sued because B commits a tort. There is, in fact, no common law doctrine of superior officer's liability. *Rosenthal & Co. v. Commodity Futures Trading Com'n*, 802 F.2d 963, 967 (7th Cir. 1986).

See also, Restatement (Second) of Agency § 358, cmt. a (1957) ("The doctrine of respondeat superior does not apply to create liability against an agent for the conduct of

---

[1] Importantly, the California statute upon which Plaintiffs rely recognizes that corporate officers and employees are acting "on behalf" of the corporation, not the officer/broker:

> "The officer designated by a corporate broker license . . . shall be responsible for the supervision and control of the activities conducted *on behalf of the corporation* by its officers and employees. . . . " Cal. B&P Code § 10159.2, emphasis added.

servants and other agents of the principal appointed by him, even though other agents are subject to his orders in the execution of the principal's affairs."); *Browning-Ferris Indus. of Ill v. Ter Maat,* 195 F.3d 953, 956 (7th Cir. 1999) ("[T]here is no doctrine of 'superiors' liability' comparable to the doctrine of respondeat superior,. . . .); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1390 (7th Cir. 1984) ("[T]he doctrine [of respondeat superior] has no reference (despite its name) to the liability of another employee who happens merely to be the supervisor but not the employer of the employee who commits the tort. The common-law does not hold a superior strictly liable for the torts of the employees he supervises. . . . ").

B. Neither The FHA Nor The HUD Regulations Demonstrate A Congressional Intent To Impose Vicarious Liability On Officer/Brokers Based On A Right Of Control.

1. The FHA does not abrogate common-law rules of agency and corporate law. The starting point for determining whether the FHA abrogates common-law rules of agency and corporate law is the language of the statute itself. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S.Ct. 941, 950 (2002). Plaintiffs are unable to state what portion of the FHA's text supports their proposed rule that corporate officer/brokers should be vicariously liable for a corporate employee's violation of the Act, based on their state law duty to control and supervise the activities of the corporate employee. This silence cannot be ignored. See, *United States v. Texas*, 507 U.S. 529, 534 (1993) ("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, 70 (1998) (Congressional silence is "dispositive").

The FHA proscribes discriminatory conduct without expressly, or even implicitly, suggesting that liability is to be vicariously imposed on a corporate officer/broker when a corporate employee or agent violates the Act. By contrast, where Congress has sought to expand the class of liable parties to include supervisory employees it has done so expressly.

For example, the word "employer" is defined broadly enough in the Fair Labor Standards Act to permit naming another employee rather than the employer as defendant, provided the defendant had supervisory authority over the complaining employee. See 29 U.S.C. § 203(d) (employer within the meaning of the Fair Labor Standards Act includes "any person acting directly or indirectly in the interest of an employer in relation to an employee"); *Patel v. Wargo*, 803 F.2d 632, 637-638 (11th Cir. 1986). No such expansive language is found in the FHA. 42 U.S.C. §§ 3604-06.

Similarly, Congress has spoken directly when it has imposed a "control test" such as that proposed by Plaintiffs 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).

In sum, "[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 (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,* 499 U.S. 83, 101 (1991).

2. The HUD regulations demonstrate an intent to adhere to common-law principles of agency and vicarious liability. Plaintiffs, like the Court of Appeals, rely on *former* 24 C.F.R. § 103.20(b) (1999) which provided for filing an administrative complaint

> against any person who directs or controls, or has the right to direct or control, the conduct of another person . . . if that other person, acting within the scope of his or her authority *as employee or agent of the directing or controlling person* [violates the Act]. Emphasis added; see Resp. Br. 31-33.

Thus, the regulation (when it was in effect) did not authorize the filing of an administrative complaint against any person based solely on "the right to direct or control the conduct of another." The regulation further required that the person engaged in a discriminatory housing practice must have acted "as employee or agent of the directing or controlling person."

A corporate employee, however, is not the "employee or agent" of a supervising officer. Even when a corporate officer or supervisor is authorized to direct or control the job-related conduct of another employee, that employee remains the "employee or agent" of the corporation itself,

not the individual officer or supervisor.[2] See, *e.g.,* Restatement (Second) of Agency § 358, cmt. a (1957). Accordingly, the text of the regulation, when read as a whole, incorporates traditional agency principles.

HUD's contemporaneous explanation of the former regulation further clarifies the agency's intent to incorporate, not deviate from, traditional common-law agency principles. HUD first addressed the issue of vicarious liability in 1984, when it published a *proposed* § 105.13, entitled "Persons against whom complaints may be filed." Subdivision (b) of this section was substantially identical to the language in § 103.20, *except* that it omitted the requirement that the agent be acting "in the scope of employment." 49 Fed. Reg. 40533 (proposed Oct. 16, 1984); see, *Walker v. Crigler,* 976 F.2d 900, 906 (4th Cir. 1992).

In response to concerns that the regulation could be interpreted as imposing strict vicarious liability on corporate officers for the unlawful acts of the corporation's agents, HUD's comments accompanying the publication of the final version of the rule – which was the version relied on by the court of appeals – make clear this was *not* HUD's intent. According to HUD,

> NAR [National Association of Realtors®] contended that the judicial decisions do not establish a rule of absolute liability (without fault) as

[2] It is undisputed that at all relevant times Crank (and all Triad salespersons) were employed by Triad and were acting as Triad sales agents. J.A. 8 ("Each agent of Triad, including Grove Crank, Terry Stump and Lois Carrol, is employed by Triad under the supervision or direction of Mr. Meyer in his capacity as its broker and president"); see also, J.A. 40; J.A.L. 10-11.

> paragraph (b) would impose. NAR argued that *the decided cases* focus only on the liability of a broker for conduct of his or her salespersons, but *do not mandate absolute liability on the basis of mere right 'to direct or control'* without reference to instructions, policies, compliance programs and other actions of the principal. . . . In response, it is not HUD's intent to impose absolute liability on any principal; *the intent, in proposing paragraph (b), was to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to liability of a principal for acts of an agent. . . . Walker v. Crigler, supra,* 976 F.2d at 907, citing 53 Fed. Reg. 24185 (1988), added emphasis; see also, 54 Fed. Reg. 3260-61 (1989).

Although the cases apparently referred to by HUD (see Gov't Br. 19, n. 3) recognized that principles of vicarious liability apply to suits under the FHA, those decisions taken together cannot be said to reflect a judicial consensus regarding the precise application of those principles. Several of the cases deal with the liability of the corporate employers rather than of individual officers or supervisors. See, *e.g., Marr v. Rife*, 503 F.2d 735, 740-742 (7th Cir. 1974); *United States v. Northside Realty Assocs,* 474 F.2d 1164, 1168 (5th Cir. 1973). Others hold the corporate officer liable for his personal participation in the discriminatory conduct. See, *e.g.*, *Northside Realty Assocs v. United States,* 605 F.2d 1348, 1354 (5th Cir. 1979). None holds

that common-law rules of agency and corporate law should be disregarded in adjudicating claims under the FHA.[3]

Thus, HUD's comments confirm the most straightforward reading of the text of former § 103.20: established principles of agency law, and not strict liability based on a state created right of control, govern imposition of vicarious liability under the FHA. See, *United States v. Balistrieri,* 981 F.2d 916, 930 (7th Cir. 1992) (principals may be held liable for the conduct of their agents in violation of the FHA under established rules of agency); Carla Caplan, *The Decline And Recent Revival Of Absolute Vicarious Liability Under The Fair Housing Act*, 48 Rutgers L. Rev. 581, 600-01 (1996) ("A study of HUD guidelines and their evolution . . . reveals that HUD supports using ordinary agency principles for FHA claims").[4]

---

[3] Plaintiffs also cite three administrative law judge decisions which they contend endorse a "direct or control" standard for liability. Resp. Br. 33-34 and fn. 15. In *HUD v. Active Agency,* Fair Housing – Fair Lending Rptr. ¶ 25,141 (HUD ALJ 1999) the ALJ relied on *Cabrera v. Jakabovitz*, 24 F.3d 372, 389 (2nd Cir. 1992). In *Cabrera*, the court applied traditional doctrines of respondeat superior and found landlords liable for discrimination by their brokers. *Id*., at 385-88. In *HUD v. Properties Unlimited*, Fair Housing – Fair Lending Rptr. ¶ 25,009 (HUD ALJ 1991) the company was a fictitious business, and thus not a separate legal entity. Accordingly, the ALJ found the owner vicariously liable for the discriminatory conduct of his own employees. Finally, in *HUD v. Murphy*, Fair Housing – Fair Lending Rptr. ¶ 25,002 (HUD ALJ 1990) the ALJ imposed liability under a non-delegable duty theory. Even Plaintiffs do not attempt to impose liability under the FHA on this theory. See Resp. Br. 43. These administrative decisions, alone or together, do not constitute an endorsement of a "right of control" standard.

[4] Plaintiffs cite HUD's definition of "Broker" or "Agent" as creating a broader definition of agency under the FHA. Resp. Br. 32-33. That definition "includes any person authorized to perform an action *on*

(Continued on following page)

C. Abandoning Common-Law Principles Of Agency And Corporate Law Is Not Necessary To Further The Purpose Of The FHA.

The declared policy of the FHA is "to provide within constitutional limitations for fair housing throughout the United States." 42 U.S.C. § 3601. According to Plaintiffs, ignoring the corporate form in order to impose vicarious liability on an officer/broker is necessary to achieve that objective. Resp. Br. 34-36. This is incorrect.

1. Under existing law, victims of discrimination have a remedy against the agent who is directly liable for the discrimination, the agent's corporate principal and, in certain limited circumstances, the corporate officer. Plaintiffs who allege they are victims of FHA violations 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 his corporate employer under a theory of respondeat superior. No legitimate policy is furthered by additionally imposing vicarious liability on an innocent officer or supervisor based solely on his right of control over the corporation's employees under state law.

Moreover, an individual officer or supervisor still faces liability under the FHA for the consequences of his own violations of the Act. Such liability, however, is direct, not vicarious. "Although a supervisor could of course be held liable by reason of his personal fault . . . that would not be

---

behalf of another person regarding any matter related to the sale . . . of dwellings," thus incorporating, rather than deviating from, HUD's stated intent to follow established rules of agency. 24 C.F.R. § 100.20 (2002), emphasis added.

by virtue of respondeat superior, a doctrine of imputed liability." *Rosenthal & Co. v. Commodity Futures Trading Com'n, supra,* 802 F.2d at 967. Importantly, in the present case, Plaintiffs did not allege Meyer *personally* engaged in discrimination against Plaintiffs in violation of the FHA. J.A. 7-15. This was confirmed by both the district court (J.A. 30 ["plaintiffs do not allege that Meyer had anything to do with the actions described in the complaint"]), and by the Court of Appeals (J.A. 66 ("the evidence does not indicate that Crank acted with the approval or at the direction of Meyer")).

2. The corporate form is not inimical to the purpose of the FHA. According to Plaintiffs, to achieve the goal of the FHA requires that brokers be held liable "regardless of their business form." Plaintiffs cite to statistics in California that 85 percent of real estate brokers in this state use a non-corporate business form. Therefore, Plaintiffs assert, "[t]o hold that Meyer, as Crank's supervising broker, is responsible for Crank's discrimination would thus do no more than equate Meyer's responsibilities with those of the vast majority of his fellow brokers. . . . " Resp. Br. 34-36. Plaintiffs' invitation to summarily dispense with the corporate form should not be accepted by the Court.

Far from being an aberration, the corporation is an integral, and critical, component of the economy of this country. "[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." *Anderson v. Abbott,* 321 U.S. 349, 361-62 (1944); *Cedric Kushner Promotions Ltd. v. King,* 533 U.S. 158, 163 (2001). This is as true for one-person corporations as it is for large ones. *Nelson v. Adams USA, Inc.,* 529 U.S. 460, 471 (2000) ("One-person corporations are

authorized by law and should not lightly be labeled sham"); *Kirno Hill Corp. v. Holt*, 618 F.2d 982, 985 (2nd Cir. 1980) ("[I]ndeed, individuals may incorporate for the very purpose of avoiding personal liability").

Moreover, to hold corporate officer/brokers vicariously liable would do far more than equate them with the "vast majority of other brokers," as Plaintiffs suggest. Even though corporate licensees represent only 14 percent of all licensed brokers in California, a full 45 percent of all licensed salespersons work for these corporate brokers. See CAR Br. 5-6. It is only by reason of the protection afforded by the corporate form that officer/brokers are able to take on this responsibility. See CAR Br. 8-9. Thus, far from the innocuous consequences predicted by Plaintiffs, adopting their proposed rule to impose vicarious liability on corporate officer/brokers would, in California alone, affect nearly half of the real estate salespeople in the state and seriously undermine the entire real estate industry.

II.

MEYER IS NOT LIABLE AS A LICENSEE.

Plaintiffs assert that "Meyer is liable as the licensee under whose license Crank acted." Resp. Br. 36-39.[5] According to Plaintiffs, such liability adheres "[a]part from whether Meyer and Crank are considered to have a

[5] The district court found Crank was licensed as a salesperson for Triad, not Meyer. J.A. 52-55. The court of appeals agreed that the licensed broker is the corporation, but nevertheless held Meyer could be liable based on his responsibility to supervise corporate employees. J.A. 68-69.

principal-agent relationship or whether Meyer may be vicariously liable for Crank's discrimination." Resp. Br. 36. Thus, it appears (although it is by no means clear) that Plaintiffs are asserting that Meyer is absolutely liable under the FHA based on a state licensing scheme. This argument – which once again turns on an interpretation and application of state law to determine liability under a federal statute – should be summarily rejected for two separate reasons.

First, personal liability of a corporate officer under the FHA cannot be premised on the theory of a nondelegable duty under state law. The only relevant authority cited by Plaintiffs is a comment to Restatement Second Torts § 214, which sets forth the concept of a nondelegable duty.[6] See, *Gen. Bldg. Contractors Ass'n v. Pennsylvania, supra*, 458 U.S. at 395-96.[7] As discussed in Meyer's opening brief (Pet. Br. 21-27), and as plaintiffs apparently concede (Resp. Br. 43 and n. 20), the FHA does not impose a nondelegable duty. Assuming such a duty exists under state law, it cannot be grafted onto the FHA without direction from Congress. See, *Moor v. Alameda County,* 411 U.S. 693, 701-702 (1973).

---

[6] 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.

[7] The other authority cited by Plaintiffs – *Chicago, Burlington and Quincy RR v. Willard*, 220 U.S. 413, 421-24 (1911) and *Railroad Co. v. Barron*, 5 Wall. (72 U.S.) 90 (1866) – addressed liability between lessor and lessee railroads.

Second, as recognized by both the district court and the court of appeals, Triad salespersons acted under Triad's, not Meyer's license. 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 the 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; Cal. B&P Code §§ 10159, 10211.

Accordingly, 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.

Thus, none of the alleged discriminatory acts were committed by an agent acting under Meyer's individual license. Accordingly, liability cannot be imposed on this basis.

III.

VIOLATION OF A STATE IMPOSED DUTY TO SUPERVISE DOES NOT GIVE RISE TO LIABILITY UNDER THE FHA.

In their first amended complaint, Plaintiffs pled causes of action under state law for statutory and general negligence, based on Meyer's alleged breach of his statutory duty to supervise and control the corporation's sales agents. J.A. 22-23. These state causes of action were dismissed by the district court. J.A. 28-30. Plaintiffs did not appeal from the dismissal of their state claims. See Appellants' Opening Brief. Plaintiffs now raise these claims in this Court, claiming Meyer's alleged violation of

a "nondelegable duty" under state law gives rise to liability under the FHA.[8] Resp. Br. 39-44. Plaintiffs' attempt to resurrect their state law claims in this Court under the guise of a federal statute should be rejected.

The FHA itself does not impose a duty to supervise, and does not make a failure to supervise a violation of the Act. 42 U.S.C. § 3604. Thus, liability under the FHA for a failure to supervise could only be accomplished by supplementing the Act with state law. However, the state statutory scheme cannot be used to create substantive federal liability without direction from Congress. *Moor v. Alameda County, supra,* 411 U.S. at 701-02.

As the Court has cautioned, "[f]ederal law is no jurisdictional chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of venue statutes. It is found in the federal Constitution, statutes, or common law." *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 471-472 (1942).

The Court should reject Plaintiffs' proposal to create a standard of liability under the FHA tethered in each case to an in-depth inquiry into the vagaries of state licensing laws. See, Resp. App. 1-10. The duty of a corporate officer/broker to control and supervise the corporation's

[8] Plaintiffs concede that "this case does not even raise the issue whether the FHA itself imposes a nondelegable duty not to discriminate." Instead, they contend, "the nondelegable nature of Meyer's duties arises out of the law of California." Resp. Br. 43, footnote and citations omitted.

employees is a duty imposed by state law, the breach of which can and should be remedied under state law.[9] See, Resp. App. 8-10. Liability under the FHA is, and should be, a question of federal law.

IV.

PLAINTIFFS WAIVED AN ALTER EGO CLAIM BY FAILING TO PROPERLY PLEAD IT OR RAISE IT ON APPEAL.

Plaintiffs argue for the first time in this Court that Meyer can be held individually liable as the alter ego of Triad. Resp. Br. 45-47.[10] While the alter ego doctrine may be available in the appropriate case (see, *United States v. Bestfoods, supra,* 524 U.S. at 62-63), plaintiffs cannot rely on that theory due to their failure to both properly plead this claim in the district court or raise it in the Court of Appeals.

---

[9] Plaintiffs suggest that leaving enforcement of state statutory schemes to the states is somehow inadequate. They cite a letter from Commissioner Pool of the California Department of Real Estate that since 1990 the Department has not disciplined a licensee for violation of state or federal fair housing laws. Resp. Br. 22, n. 9. A reading of Commissioner Pool's letter belies this reliance. Commissioner Pool states that "without physically reviewing every disciplinary file, it is not possible to determine the exact number of actions taken against real estate brokers for acts of discrimination." Moreover, to the extent the Department has not been required to discipline brokers for discrimination, Commissioner Pool's letter is evidence of the efficacy of the state regulatory scheme, and supports federal abstention from, rather than intervention in, state law.

[10] This argument was first raised by the Government in its *amicus* brief. Gov't Br. 24-28.

First, Plaintiffs never pled alter ego in the district court. "While specificity may not be required to plead an alter ego theory, one must allege more than ownership, shareholder or partnership status." *Leykis v. NYP Holdings, Inc.*, 899 F.Supp. 986, 991-92 (E.D.N.Y. 1995); see, *Zinaman v. USTS New York, Inc.*, 798 F.Supp. 128, 132 (S.D.N.Y. 1992) (dismissing alter ego theory for failure to plead "control and dominion"); see also, *Kirno Hill Corp. v. Holt, supra,* 618 F.2d at 985 (sole ownership "does not alone justify piercing the corporate veil").

The need to plead alter ego with specificity is critical because it involves a substantive theory of liability. "Alter ego/veil piercing claims involve a substantive theory for imposing liability upon entities that would, on first blush, not be thought liable for a tort or on a contract." *Futura Development of Puerto Rico, Inc. v. Estado Libre Asociado de Puerto Rico*, 144 F.3d 7, 12 (1st Cir. 1998). Thus, it is of particular importance that a pleading of alter ego give "fair notice" of the claim being asserted and the "grounds upon which it rests." See, *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

Here, plaintiffs' only allegation was that Triad was "owned and operated by Mr. Meyer, who served and continues to serve [as] its president and designated officer/broker." J.A. 7. Such an allegation is insufficient as a matter of law to plead a theory of alter ego, and certainly did not give Meyer fair notice of an alter ego claim. See, *Nelson v. Adams USA, Inc.*, *supra,* 529 U.S. at 471 ("One-person corporations are authorized by law and should not lightly be labeled sham"); *Leykis v. NYP Holdings, Inc.*, *supra,* 899 F.Supp. at 991-92; 1 *Fletcher, Cyclopedia of Corporations*, § 41.35 at 665-66 (1999) ("[T]he mere fact that all or almost all of the corporate stock is owned by one

individual or a few individuals will not afford sufficient grounds for disregarding corporateness").

Second, Plaintiffs did not raise or brief alter ego in the court of appeals, and have thus waived the issue. See, Appellants' Opening Brief. This Court will not reach an issue which was not raised or briefed below. *TRW, Inc. v. Andrews,* ___ U.S. ___, 122 S.Ct. 441, 451 (2001); *Sims v. Apfel*, 530 U.S. 103, 109 (2000), quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

The Government attempts to salvage Plaintiffs' argument by asserting the issue was properly raised in a footnote on the last page of argument in Plaintiffs' opening brief in the Court of Appeals. Gov't Br. 24, fn. 6.[11] The Government's attempt is unavailing. Merely referencing a contention in a footnote is insufficient to preserve the issue for appellate review. See *Acosta-Huerta v. Estelle,* 7 F.3d 139, 144 (9th Cir. 1992); Fed. R. App. P. 28(a)(9)(A).

More important is the text of the footnote itself. Plaintiffs stated their "evidence would show that Mr. Meyer is the *sole* shareholder of Triad, and thus an argument to pierce the corporate veil would be meritorious." Appellants' Opening Br. 59, n. 17, original emphasis. This statement merely reiterates the allegation in their complaint that Meyer could be personally liable based on his status as the sole shareholder of Triad, not on any other indicia of alter ego. This is an insufficient basis as a matter of law for finding alter ego. See, *Nelson v. Adams USA, Inc.*, *supra,* 529 U.S. at 471; *Kirno Hill Corp. v. Holt,*

[11] Plaintiffs make no such claim in their brief. Resp. Br. 45-47.

supra, 618 F.2d at 985; 1 *Fletcher Cyclopedia, supra,* § 41.35 at 665-66.

Third, allowing Plaintiffs to raise alter ego for the first time before this Court would be fundamentally unfair. "[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering, supra,* 312 U.S. at 556.

For example, Plaintiffs (and the Government) speculate that Meyer may have failed to observe basic corporate formalities. Resp. Br. 46; Gov't Br. 26. This assertion is disingenuous. Since Plaintiffs never raised alter ego in the trial court, Meyer cannot be faulted for omitting to present any evidence on this issue.

Similarly specious is Plaintiffs' and the Government's representation that "Triad itself appears to be without assets." Gov't Br. 26; Resp. Br. 5 ("It is undisputed that Crank and Triad are unable to pay any judgment in this case"). The only evidence before the district court was that there is no insurance coverage for the alleged acts of discrimination. J.A. 27. Triad remains an operating real estate corporation in good standing.

In sum, Plaintiffs cannot, and should not, be allowed to raise an alter ego theory for the first time in this Court. *TRW, Inc. v. Andrews, supra,* 122 S.Ct. at 451.

CONCLUSION

For the reasons set forth above and in Meyer's opening brief, the judgment of the court of appeals should be reversed.

Dated: October 30, 2002

Respectfully submitted,

BROWN & PEEL
JAMES W. PEEL
3585 West Beechwood
Suite 101
Fresno, California 93711
(559) 431-1300

BENEDON & SERLIN
DOUGLAS G. BENEDON*
GERALD M. SERLIN
21700 Oxnard Street,
Suite 1290
Woodland Hills, California
91367
(818) 340-1950
**Counsel of Record*

Attorneys for Petitioner
David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors