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Attorney for: **STEVE THIEME**, Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

STEVE THIEME,

Plaintiff,

vs.

DIANE E. COBB, INDIVIDUALLY, AND
DBA D.M. FINANCIAL, AKA DIANE
WINEGARDNER; D.M. FINANCIAL, A
PARTNERSHIP; PAUL SLOANE DAVIS,
INDIVIDUALLY AKA SLOANE DAVIS,
AND DBA D.M. FINANCIAL AKA D.M.
FINANCIAL AKA FINANCIAL Dm;
VANDYK MORTGAGE CORPORATION,
AND DOES 1-100 INCLUDING ROE
CORPORATIONS.

Defendants

Case No.: 3-13-ev-03827-MEJ

**SECOND AMENDED COMPLAINT
FOR DAMAGES**

1. Accounting (Cobb & Davis)
2. Breach of Fiduciary Duty (Cobb & Davis)
3. Conversion (Cobb & Davis)
4. Common Counts (Cobb & Davis)
5. Real Properties Securities Fraud (Cobb and Davis)
6. Fraud and Deceit (Misrepresentations and Concealments-Cobb & Davis)
7. Professional Negligence (Vandyk Mortgage Corporation)

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Plaintiff STEVE THIEME alleges:

PRELIMINARY FACTS AND ALLEGATIONS

1. Plaintiff Steve Thieme (hereafter referred to as "Thieme,"), a single man, presently resides in Baton Rouge, Louisiana and is a citizen of the United States. He was at all times mentioned in this complaint an employee of the Bechtel Corporation.

2. Defendant Vandyk Mortgage Corporation (hereafter referred to as "Vandyk") is a Michigan corporation, and has its principal place of business in Grand Rapids, Michigan. It is and at all times herein mentioned has been in the business of lending or arranging or brokering for residential first mortgages, *inter alia*, throughout the United States. Its primary means and vehicle for making such loans is and has been through a network of no less than 90 "branches," headed by a Branch Manager, who is a full-time employee of Vandyk, and a qualifying branch manager subject to approval and regulation by the National Mortgage Licensing System and Registry (NMLS), as well as by the California Commissioner of Corporations and Department of Finance, and a licensed mortgage loan originator.

3. The "branches" are overseen by an allegedly qualified Supervisor appointed by Vandyk for that specific oversight purpose. Since 2008, Vandyk has been a member of the NMLS. Each of its branch managers must be sponsored by Vandyk and approved by the NMLS, and Vandyk is responsible for overseeing, monitoring, supervising, and reporting on the activities of the branch managers. Under the NMLS and pursuant to the regulations of the California Commissioner of Corporations, Vandyk is fully responsible for the acts and omissions of its branches, and had and still has to post a bond of no less than \$250,000.00 to back up that

1 responsibility. Vandyk has operated under the unique NMLS identifier of 3035 since 2009,
2 approximately.

3 4. Defendant Diane Cobb aka Diane Winegardner, a married woman, has done
4 business as a loan originator, arranger, and servicer for second mortgages under the fictitious
5 name of "D.M. Financial" from 1995 to the end of 2012 (hereafter referred to collectively as
6 "Cobb,"), and under the brand name and aegis of Vandyk from approximately early 2009 to the
7 end of 2012, presently resides in the State of Ohio.

8 5. From 2009 to 2012, approximately, Cobb was a branch manager for Vandyk
9 Mortgage in Mill Valley, California, Larkspur, California, and Las Vegas, Nevada, and was
10 employed in that capacity on a full-time basis for Vandyk, ostensibly drawing her sole income
11 from Vandyk by way of salary and/or commissions. Cobb was a registered mortgage loan
12 originator and was registered by the NMLS with the identifier No. 7827, and was sponsored by
13 Vandyk Mortgage Corporation with the NMLS.

14 6. Defendant Paul Sloane Davis, a single man, was doing ostensible business
15 together with Cobb in an informal partnership known as "D.M. Financial" from approximately
16 1995 to the end of 2012. He is hereafter referred to as "Davis." The partnership was in the
17 business of arranging private single-family second mortgages based on residential real property
18 securities throughout the United States. Cobb and Davis would solicit and receive money from
19 private investors, such as the plaintiff herein, to fund the second mortgages at a high rate of
20 interest with six months to one-year durations.

21 7. Jurisdiction of this Court is based on the diversity of the respective plaintiff and
22 defendants. Cobb presently resides in Ohio. Paul Sloane Davis resides in Reno, Nevada, and
23 Vandyk Mortgage Corporation is headquartered in Grand Rapids, Michigan, and plaintiff resides
24 in Baton Rouge, Louisiana.

25 8. Until January 1, 2013, DIANE COBB was licensed to do business only as a
26 "mortgage loan originator" by the State of California, and was also licensed as such in

1 approximately seven other States. At all times pertinent to this litigation, Ms. Cobb was a full
2 time employee, qualifying officer and branch manager of VANDYK MORTGAGE
3 CORPORATION in Mill Valley and Larkspur, California until early 2011. She then transferred
4 to Las Vegas to become a branch manager and qualifying officer of Vandyk in that city until
5 January 1, 2013.

6 9. Cobb resigned as a branch manager for Vandyk effective January 1, 2013.

7 10. Cobb and Davis were indicted for wire fraud and identify theft arising out of their
8 activities as D.M. Financial, *inter alia*, in late 2013. Cobb has pled guilty and is awaiting
9 sentencing before the Honorable Judge Breyer in this judicial district. Davis has a trial pending
10 on the same matters in April 2015.

11 11. Cobb gave up all of her licenses as a loan originator across the United States on or
12 about January 1, 2013.

13 12. Vandyk Mortgage Corporation was at all times herein pertinent, and continues to
14 be a duly licensed Michigan corporation doing business in the State of California as a mortgage
15 banker and/or lender with the right and ability to broker residential loans to consumers, and is
16 registered as such with the California Secretary of State and the Commissioner of Corporations.
17 Vandyk at all times herein mentioned has been and presently is approved to do business with
18 Fannie Mae, Freddie Mac, the Veterans Administration, and the Federal Housing
19 Administration, among other Federal agencies, as an authorized lender, loan originator, and
20 mortgage broker. It has been assigned the unique identifier number 3035 by the NMLS.
21 Vandyk was and remains registered and/or licensed with the California Department of Finance
22 and the California Department of Corporations and Vandyk is presently regulated in California
23 by the Bureau of Business Oversight, and its predecessor agencies.

24 13. Both Vandyk and Diane Cobb since 2008 have annually been required to file
25 detailed reports with the NMLS covering just about every conceivable aspect and facet of their
26 business activities for the past ten years approximately, including experience, past history,

1 business background, criminal background if any, credit history and current standing, education,
2 branch activities, and so forth. In particular, Cobb had to inform the NMLS in writing of her
3 past dealings as D.M. Financial, the scope of such business, and her financial status, and other
4 background information.

5 14. Vandyk at all times herein mentioned was allowed full computer access to Cobb's
6 annual individual and branch manager reports to the NMLS. Vandyk as the employer and as the
7 sponsor of Cobb to the NMLS in 2008/2009 and at all times herein mentioned, was required by
8 the NMLS, by the California Finance Code, Finance Lenders Law (Division 9, Chapter 1,
9 Section 22000, *et seq.*), the California Code of Regulations, and by industry practice to review
10 Cobb's individual reports and statements, including her complete civil and/or administrative
11 history and records doing business as D.M. Financial, and as a loan originator, to the NMLS
12 since 2008/2009, her date of first employment by Vandyk.

13 15. Plaintiff alleges that as a licensed mortgage loan originator in the State of
14 California, Cobb was authorized to contact, receive, review, and process mortgage application
15 paperwork from individual loan applicants, but could not make or broker loans, save through a
16 person or entity licensed as a mortgage lender and/or mortgage lending broker in the State of
17 California. By processing is meant reviewing and processing the paperwork of mortgage loan
18 applicants, checking on the financial qualifications of such individuals, their credit histories,
19 their criminal backgrounds, the strength of the security being offered for such loan, preparation
20 of the promissory notes and deeds of trust, recording the deeds of trust, and so on. At all times
21 herein mentioned after 2008, Cobb was entitled to, encouraged to, and did utilize the array of
22 back-office and computer-provided banking and software services provided by Vandyk. Cobb
23 was also required to pass a test and complete continuing educations as approved by the NMLS.

24 16. Plaintiff is informed and believes, and on those grounds alleges that both Cobb and
25 Davis in the years 2008 through 2012 worked out of the offices paid for by Vandyk in Mill
26 Valley, Larkspur, and Las Vegas, Nevada, sharing the office(s), computers, loan officer staff,

1 personnel, telephone, email registrations, telephone numbers, software, and had full access to
2 internal Vandyk electronic wire communications systems, forms and loan origination and
3 manuals, including credit checking and criminal background of prospective borrowers.

4 17. Plaintiff at present Does not know the true names and capacities of those
5 individual defendants and/or entities who were participant in the acts and omissions to act herein
6 mentioned, and therefore designate them by the fictitious names of DOES 1-100. Plaintiff are
7 informed and believe, and on those grounds alleges that DOES 1-100 are jointly and severally
8 responsible for the acts, omissions to act, and the damages recited herein below, and further that
9 said DOES 1 through 100 were and are the loan originators, officers, co-conspirators, managers,
10 employers, employees, administrators, facilitators, aiders, abettors, tortfeasors, and consultants,
11 *inter alia*, of each other and of the named defendants in this lawsuit. The Plaintiff alleges that
12 they will amend this complaint to name specifically such DOES 1-100 by their true names and
13 capacities when and if they are discovered in the course of subsequent litigation and discovery,
14 and will seek leave of court to bring them into this lawsuit.

15 18. Plaintiff is informed and believes, and on the basis of such information and belief
16 alleges that Cobb was hired by Vandyk on the basis of negotiations between Cobb and Vandyk's
17 home office conducted in 2008. One basic requirement of employment as a branch manager
18 was that Cobb bring with her to the job **and continue** her **active book of business** and
19 management of current accounts, e.g. contacts, which she had previously generated through the
20 residential second mortgage bridge loan business with Davis under the name D.M. Financial.
21 Vandyk in 2008, perhaps earlier, advertised nationally on the Internet and by other means
22 according to proof, including trade magazines and on-line materials for existing independent
23 mortgage loan originators looking to improve or to maintain their economic lot. Diane Cobb's
24 D.M. Financial business arranging for second mortgage bridge loans was just such a company.
25 Vandyk openly advertised and knowingly carried into practice its intention to foster and
26 encourage "**entrepreneurship**" by urging its branch offices to "**build their businesses their**

1 own way,” It sought out branches and qualifying managers with “a consistent, active
2 pipeline” of sources [for loans], which fit Ms. Cobb’s existing operation to a “T”.

3 19. In 2008, an advertisement soliciting branch managers came to Cobb’s attention
4 from Vandyk, and they began communicating and negotiating. Plaintiff is informed and
5 believes, and on the basis of such information and belief alleges that the basic terms of their
6 employment agreement provided that Cobb would be able to and was encouraged to continue her
7 business of originating second mortgage bridge loans, underwritten by a Vandyk salary and/or
8 commission arrangement, although not derive direct profits or points or fees from such
9 origination or servicing activities, thus avoiding potential conflicts of interest with her investors
10 or with Vandyk, or with both.

11 20. Plaintiff is informed and believes, and on those grounds alleges that the continued
12 arranging of bridge financing was part and parcel of Cobb’s job with Vandyk, and she was
13 expected and as a practical matter was *de facto* required by Vandyk to pursue those activities
14 under the name of D.M. Financial, with the perception by Vandyk and Cobb that the various
15 bridge loans would hopefully lead to approved first mortgage applications through Cobb,
16 whether from a satisfied bridge loan investor, a happy borrower of a bridge loan, a reference
17 from a Federal department, for example, the Department of Energy for one of its relocating
18 employees, or some other source directly or peripherally knowledgeable of Cobb’s bridge loan
19 activities.

20 21. Plaintiff is informed and believes, and on the basis of such information and belief
21 alleges that Cobb fully disclosed to Vandyk during the course of its hiring process of her in
22 2008/2009 her bridge loan methodologies as D.M. Financial, e.g. soliciting investors, receiving
23 money from investors to invest in bridge mortgages, bank the funds received, locating borrowers,
24 drafting the paperwork, recording deeds of trust, conducting the credit, financial, and title
25 investigations ordinarily ancillary to making such loans, securing signatures, servicing the loans
26 throughout their term, opening trust accounts or escrow accounts, forwarding monies to the

1 investors, communicating with investors, providing accountings related to the individual
2 investments, *inter alia*. It was Cobb's extensive experience in operating as a mortgage loan
3 administrator with a proven track record that attracted Cobb to Vandyk.

4 22. Plaintiff is informed and believes, and on the grounds of such information and
5 belief, alleges that as of 2008 Vandyk had an established process for vetting prospective branch
6 managers, such as Cobb, and in 2008/2009, and annually thereafter, applied such process to
7 Cobb's employment. The process included lengthy personal interview(s) by senior Vandyk staff
8 with Cobb by email, telephone, and meetings, and review of applicable documentation. During
9 said vetting process, Vandyk was able to and did explore all of the methodologies outlined in
10 paragraph 21, above. Ultimately a written contract was executed between Cobb and Vandyk in
11 2008/2009.

12 23. Vandyk was required as the sponsoring mortgage banker for Cobb to vet her
13 background and qualifications very carefully, as Vandyk had to meet the disparate employment
14 requirements for its branches of the various Federal housing agencies which provided insurance
15 for its residential loans, such as but not limited to a Federal Housing Administration requirement
16 that employees not have outside jobs in the banking, real estate, and related fields, so as to avoid
17 any possibility of a conflict of interest between the employee and a borrower.

18 24. Vandyk was required by the rules and regulations of the other Federal and State
19 agencies whose statutes, strictures, practices, policies, regulations, rules, and best practices it was
20 mandated by those agencies to closely adhere to all of such requirements, regardless of which
21 agency or department was involved from time to time. These agencies included but are not
22 limited to the Department of Housing and Urban Development, the Federal Housing
23 Administration, the Mortgage Review Board, the Veteran's Administration, the Comptroller of
24 the Currency, the Federal Reserve System, the Consumer Finance Protection Board, and the
25 State regulatory agencies, which have already been mentioned. Similarly, Vandyk was required
26 to follow a plethora of laws dealing with various aspects of the residential mortgage lending

1 process, such as the Truth in Lending Act (TILA-2008), the Real Estate Settlement Practices Act
2 (RESPA), the Dodd-Frank Act (2010), the Secure and Fair Enforcement of Mortgage Lending
3 Act (SAFE) of 2008, the Housing and Economic Recovery Act (2008), and other laws according
4 to proof.

5 25. Vandyk was also required as Cobb's employer to exercise close oversight and
6 supervision of all of Cobb's loan origination activities, whether for FHA insured loans, or VA
7 loans, or other loan activities, because under the NMLS and the SAFE Act, *inter alia*, it was her
8 employer, and because Cobb's D.M. Financial activities had become part of Vandyk's marketing
9 scheme. Plaintiff Thieme would not have suffered the harm he experienced, e.g. the loss of
10 approximately \$150,000.00, if Vandyk had dutifully undertaken the oversight, supervision, and
11 monitoring control of Cobb—who after all **was** D.M. Financial—after 2009. Vandyk was also
12 required to undertake risk management and quality control practices which would ensure that
13 conflicts of interest did not arise stemming from the activities of its employees and branches.

14 26. Vandyk's duties of inquiry as to Cobb was limited to the banking, real estate, and
15 related fields, as only those areas of economic endeavor were distinctly within its field of
16 operation as a mortgage lender/broker. But within these fields, Vandyk was expected to make a
17 diligent and careful investigation, a matter made more important by the fact that Cobb's bridge
18 loans were nontraditional mortgage loan products, e.g. interest only, lower substantiation, less
19 documentation, as they bore a higher risk than traditional mortgages. Vandyk was aware of this
20 oversight requirement by both Federal and State regulators which approved and supervised its
21 compliance with mortgage loan regulations.

22 27. Plaintiff Thieme had been a first mortgage borrower for his own real estate
23 directly from Vandyk since approximately 2006, and refinanced his property through Vandyk in
24 approximately 2011. Plaintiff had also been a private investor with Cobb since approximately
25 2008, or earlier. Altogether, in the period 2010-2012, Thieme deposited no less than
26 \$150,000.00 with Cobb in the latter's bridge loan mortgages. To qualify for a re-financed first

1 mortgage in 2011, Thieme was required to disclose his existing investment(s) in said bridge
2 loans. Plaintiff is informed and believes, and on the basis of such information and belief alleges
3 that Thieme's first mortgage loan of 2011 was reviewed and approved by Vandyk's home office,
4 and that that office was thereby put on constructive and/or actual notice that Cobb's bridge loan
5 activities were continuing.

6 28. In making his bridge loan investments from 2008 to 2012, Thieme reviewed
7 Vandyk's history, size, scope of activity, branch offices, loan tracking, auditing capacity,
8 computer systems, and other qualifications by reviewing their national advertising on the
9 Internet, which was Vandyk's primary marketing exposure to the public. This advertising
10 emphasized Vandyk's many years of experience in making all kinds of loans, cited its back-
11 office staff as providing the technical expertise to oversee all Vandyk loans, stressed the
12 education, experience, and knowledge of its branch offices (among them Cobb's), noted that the
13 home office had substantial computer software in place by which it could continually monitor its
14 mortgage activity and process, and was able to provide a full library of Federal and state
15 regulations available to all of the branches. Vandyk advertised its membership in the Michigan
16 Mortgage Lending Association, the NMLS, and its approvals as a Fannie Mae, Freddie Mac,
17 HUD, FHA, VA lender.

18 29. Thieme, after reviewing this advertising had full confidence, when investing in
19 the bridge loans offered by Cobb after 2008, that Vandyk was fully aware of and extensively
20 controlled the former's secondary mortgage activities. Thieme was informed and believed after
21 2008, that the business which called itself "D.M. Financial," was identical and interchangeable
22 with that of Vandyk, and was so informed of that fact by Cobb herself, and by the fact that the
23 telephones to Cobb's offices after 2008 were answered in the name of "Vandyk Mortgage," and
24 that business forms with the name of Vandyk Mortgage on them were used in the bridge loan
25 process.

1 30. Thieme was persuaded by and justifiably relied on these advertisements and
2 statements of qualifications, by Vandyk, believing that Vandyk possessed the expertise, means,
3 and the intention to fully monitor and supervise the acts of its employees, such as Cobb,
4 including the activities conducted under the name of D.M. Financial, such as the bridge loan
5 mortgages in which he was an investor.

6 31. Thieme believed that Vandyk would not have appointed Cobb as a branch
7 manager had her experience, including her bridge loan methodology and practices not been
8 scrutinized and evaluated in the context of regulatory statutes and requirement, and approved by
9 Vandyk's home office.

10 32. Thieme was not aware or otherwise informed at any time prior to 2013, that the
11 entire control system of its loans touted by Vandyk in its national advertising from 2008 through
12 2012 *did not in reality extend to branch bridge loan activities* such as that conducted by Cobb,
13 but was limited in its scope to internal loans made by Vandyk, and that the branch offices were
14 expected to act more or less as wholly independent entrepreneurial entities, locating potential
15 borrowers by any means, including the making of bridge loans. Thieme was not informed that
16 the auditing, quality control, and risk management procedures of Vandyk also did not extend to
17 the bridge loan activities and other methodologies by which potential borrowers and investors for
18 Vandyk first mortgages were located. He was unaware that Vandyk deliberately eschewed
19 investigation of Cobb's bridge loan activities, and exercised no control whatsoever over Cobb's
20 trust/escrow accounts into which his monies were allegedly deposited.

21 33. Thieme believed, on the basis of Vandyk's national advertising reviewed by him,
22 and by the statements of Cobb herself, and by her use of the Vandyk brand, offices, and
23 telephones, *inter alia*, that Cobb's existing bridge loan investors, borrowers, and contacts as of
24 2008/09 had become an integral part of Vandyk Mortgage Corporation. A full-time branch
25 manager, such as Cobb, Thieme reasonably believed, would adhere closely to Vandyk's
26 advertised supervisory and regulatory practices.

1 34. Plaintiff alleges that Vandyk's hands-off supervisory approach to monitoring its
2 branch offices was practiced in complete and reckless disregard of federal and state laws
3 regulating the residential mortgage lending industry, as well as of industry practice. While such
4 laws as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and the
5 Housing and Economic Recovery Act of 2008, and the Safe and Fair Mortgage Lending Act of
6 2008 sought to rein in and create a systematic regulatory scheme over the mortgage lending
7 industry, Vandyk from the beginning of 2009 sought for a means to avoid the restrictions and
8 strictures of these laws. It would create the illusion of a tightly controlled branch office system,
9 while at the same time endorsing through its selective non-attention the continuation of those
10 very practices which the foregoing laws had sought to implement. This was a deceptive,
11 unsavory, and unlawful business practice by Vandyk, and one to which plaintiff Thieme fell easy
12 prey.

13 35. Plaintiff is informed and believes, and on the grounds of such information and
14 belief, alleges that the plethora of federal and state laws extensively regulating the mortgage
15 lending industry in 2008 and thereafter were predicated on the fact that great financial losses had
16 occurred to American investors in the real estate mortgage industry, and that further such losses
17 would occur unless legislation and fulfilling regulations were passed by Congress and by the
18 states to prevent such losses. In short, the continued loss of money by the public from
19 investment in faulty real estate securities was **foreseeable**, as a result of poor and inadequate
20 mortgage loan practices, such as that practiced by Cobb, unless new laws were written and
21 enforced, which they were. The NMLS was but one among several lynchpins impacting the
22 federal and state regulations devised to make mortgage lending practices safer and predictable.

23 36. Plaintiff alleges that Vandyk at all times herein referenced was and continues to
24 be required by law to maintain detailed and intensive quality controls and reporting to assure that
25 it and its employees avoid conflicts of interest in its mortgage lending operations, including
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1 periodic investigation of employee backgrounds, auditing of branch office finances and accounts,
2 and site inspections.

3 37. These quality controls at all times included but were not limited to investigation
4 of individuals prior to their hiring as employees and in the case of a prior business being
5 absorbed by Vandyk, such as D.M. Financial, a careful and diligent analysis of the financial
6 history and methods used by such business(es), including its banking history and practices.
7 These quality controls were to continue throughout the employee's tenure at Vandyk.

8 38. Plaintiff are informed and believe, and on the basis of such information and belief
9 alleges that violations of these rules, including conflicts of interest, operation of prohibited
10 branch arrangements, failure to have proper State approval for their dba names, e.g. 'D.M.
11 Financial'; failure to pay all its operating expenses; failure to have direct supervision of
12 employees; failure to exercise control and supervision of staff; maintaining prohibited net branch
13 arrangements; using misrepresentative advertising; failure to follow loan originations
14 requirements; improper use of escrowed funds, e.g. trust accounts by licensees, are strictly to be
15 reported to the NMLS, and are then to be enforced by various regulatory agencies such as but not
16 limited to the Mortgage Review Board of the FHA, and other Federal and state agencies
17 (California Department of Finance; Bureau of Business Oversight (California); Consumer
18 Protection Bureau (Federal Reserve Board), according to proof.

19 39. As noted, the chief governmental mechanisms of such enforcement are through
20 the Nationwide Mortgagee Licensing System and Registry (NMLS), the Mortgage Review Board
21 of the Federal Housing Administration, and the State regulatory schemes, the Consumer Finance
22 Protection Board, among others. Common to all these systems of enforcement is the right of the
23 regulatory agency(ies) to issue immediate cease and desist orders to all persons identified as
24 violators of the above regulatory schemes, and to order restitution in a manner consistent with
25 the Constitutional requirement of due process.

1 40. Plaintiff alleges that defendant Vandyk, as an integral part of its business model,
2 did in fact maintain, approve, condone, substantially encourage, aid, and abet, and ratify the
3 establishment of a prohibited net branch in the offices maintained by Vandyk and Cobb in Marin
4 County, California and in Las Vegas, Nevada, commencing in 2008, and continuing thereafter.

5 41. Plaintiff alleges that Cobb and Does 1-10 did in fact make herself personally
6 liable to the plaintiff investors, with whose money she was arranging bridge loans, by promising
7 to repay their loans herself if the loans failed. Plaintiff further alleges that Cobb, from her
8 personal funds, which practice was a violation of Federal laws and industry practice as these
9 applied to branch offices, also paid her staff to work in the Vandyk offices on D.M. Financial
10 business, in addition to their paychecks received from Vandyk at the same time, and that she
11 commingled the offices, equipment, credit-checking references, and other services of her D.M.
12 Financial activities with those of Vandyk. She did engage in these activities while working for
13 Vandyk as a branch manager.

14 42. Cobb did not seek direct reimbursement from Vandyk for her personal
15 expenditures on behalf of her second mortgage activities, which would have been necessary to
16 avoid the status of an illegal net branch arrangement, but instead indirectly recovered said
17 expenditures by way of her salary and commission income from Vandyk.

18 43. Plaintiff alleges that if Vandyk had exercised the quality controls in the areas
19 discussed above (see paragraphs 37 and 38), the acts and omissions to act of Cobb and Davis
20 would have been discovered, and stopped as early as 2009, by such means as injunction or
21 termination.

22 44. Plaintiff Thieme alleges that by encouraging, assisting, and condoning D.M.
23 Financial's bridge loan activities after Cobb's employment by Vandyk, including the use of the
24 Vandyk name and reputation, Vandyk essentially ratified Cobb's D.M. Financial acts and
25 omissions to act and continued to make it part of her scope of employment at all times herein
26 mentioned.

45. Plaintiff Thieme alleges that bridge loan investments made by him in Marin County, California and Las Vegas, Nevada, comprising approximately \$150,000.00, were converted or otherwise lost in the past three to four years, according to proof, by Cobb and Davis, with the assistance of the nonfeasance and/or negligence of Vandyk. Thieme has made demand for the restitution of such monies, but the defendants and each of them have refused to do so.

FIRST CAUSE OF ACTION

(FOR AN ACCOUNTING AS TO COBB, DAVIS, AND DOES 1-100)

46. Plaintiff incorporates by this reference each and every allegation set forth in paragraphs 1-45 above, as though fully stated herein below.

47. Plaintiff has demanded that defendants make to him a complete accounting of the approximately \$150,000.00 deposited with Cobb, Davis, and Does 1-100. The defendants have failed and refused to make such an accounting.

WHEREFORE, Plaintiff prays for the following relief:

1. For an Order of this court directing Cobb and Davis, and Does 1-100, to make a full and complete accounting of the approximately \$150,000.00, and any other sums due to Plaintiff;
2. For reasonable attorney fees pursuant to Business & Professions Code Section 10238.7, and other statutes according to proof;
3. For costs of suit;
4. For such other relief as may be proper.

SECOND CAUSE OF ACTION

(BREACH OF FIDUCIARY DUTY AS TO COBB, DAVIS, and DOES 1-100)

48. Plaintiff incorporates by this reference each and every allegation set forth in paragraph 1-47 above, as though fully stated herein below.

1 49. Plaintiff forwarded \$150, 000.00 approximately to Cobb, Davis, and Does 1-100,
2 which was to be deposited with WestAmerica Bank, the Bank of America, or other depository
3 institutions.

4 50. Plaintiff is informed and believe, and on the grounds of such information and
5 belief alleges that Defendants Cobb, Davis, and Does 1-100 were the trustees of a resulting trust
6 or constructive trust as to the \$150,000.00 deposited with them by the Plaintiff, and as trustees or
7 fiduciaries recommended bridge loan investments to the Plaintiff, obtained documentation
8 securing the loans, transmit such documentation to the Plaintiff, collected the payments,
9 remitted the payments received from the borrower(s) to the Plaintiff, and returned the principal
10 of the loan(s) to the investor when the loan was paid off by the borrower.

11 51. By virtue of the acts, allegations, and activities referenced above, Cobb, Davis,
12 and Does 1-100 were the fiduciaries of Plaintiff, owing to him or her the highest degree of care
13 and honesty.

14 52. Cobb, Davis, and Does 1-100 breached the fiduciary duty that they owed to
15 Plaintiff by losing and/or wasting, and/or squandering the \$150,000.00 of the Plaintiff, by failing
16 to account for these funds, and/or by defrauding the Plaintiff, and/or by converting the money
17 entrusted to them by the Plaintiff, and/or by failing to return said monies to the Plaintiff, and/or
18 by failing to use the monies entrusted to them for the purpose which they had promised to
19 perform.

20 53. As a direct and proximate result of the alleged breach of fiduciary duty by Cobb,
21 Davis, and Does 1-100, as above stated, the Plaintiff has lost no less than \$150,000.00, plus any
22 income and/or interest derived from said monies, according to proof;

23 54. As a direct and proximate result of the alleged breach of fiduciary duty by Cobb,
24 Davis and Does 1-100, as above stated, the Plaintiff has incurred general damages for anxiety,
25 emotional distress, and related physical impacts in a sum according to proof.

55. The acts and omissions to act of Cobb, Davis, and Does 1-100 as hereinabove recited were performed with reckless disregard of the rights and interests of the Plaintiff, were malicious in the extreme, and constituted fraudulent and despicable behavior toward the Plaintiff. As a result, the Plaintiff is entitled to punitive damages in a sum according to proof at the time of trial.

56. As a direct and proximate result of the acts and omissions of Cobb, Davis and Does 1-100, the Plaintiff has been required to engage legal counsel, and is entitled to an award of reasonable attorney fees arising out of the promissory notes, the deeds of trust, and by statute, in an amount according to proof;

57. The Plaintiff is entitled to recovery of interest on the \$150,000.00 and such further sums as may be proven at the time of trial hereon at the legal rate of interest in the State of California from a date according to proof.

WHEREFORE, Plaintiff prays for relief as follows:

1. For the sum of no less than \$150,000.00;
2. For disgorgement of any profits and/or fees received by the defendants named in this cause of action;
3. For general damages in an amount according to proof;
4. For punitive damages in an amount according to proof;
5. For an accounting;
6. For reasonable attorney's fees according to proof;
7. For interest at the rate of ten percent per annum from a date according to proof;
8. For costs of suit;
9. For such other and further relief as to the Court shall seem proper.

THIRD CAUSE OF ACTION

(CONVERSION OF FUNDS AS TO COBB and DAVIS)

58. Plaintiff incorporates by this reference each and every allegation set forth in paragraph 1-49, as though fully set forth herein below.

59. Plaintiff alleges that the \$150,000.00, and the interest which should have been derived from making of loans therefrom, was his sole and separate property.

60. Plaintiff alleges that by doing the acts hereinabove alleged, Cobb, Davis, and Does 1-100 converted the \$150,000.00 and associated interest to their own use and benefit;

61. Plaintiff alleges that he or she has demanded the return of his or her property, and alleges that these defendants have refused and continue to refuse to return their money to them.

62. Plaintiff alleges that his or her \$150,000.00, while initially deposited by him or her into the possession of these specific defendants was with the Plaintiff's consent, such consent was on or about July 31, 2012, rescinded, and demand was duly made for its return to the Plaintiff, plus interest. The monies have still not been returned to the Plaintiff.

63. Plaintiff alleges he/she is entitled to a fair compensation for the time and money, according to proof, expended in pursuit of their property, including travel, lodging, legal fees, costs of suit, and other matters, to be proven at the time of trial, pursuant to Civil Code Section 3336.

WHEREFORE, Plaintiff prays for relief as follows:

1. For return of his/her money in the amount of \$150,000.00, plus any interest which may have accrued from the use of such monies;
2. For an accounting of the \$150,000.00;
3. For general damages in a sum according to proof;
4. For punitive damages in a sum according to proof;

1 5. For disgorgement of any profits and/or interest received by these specific
2 defendants from the use of the \$150,000.00;

3 6. For reasonable attorney's fees pursuant to promissory notes, deed of trust
4 generated by the \$150,000.00 and by statute according to proof, including but not limited to
5 Business and Professional Code Section 10328.7, but not limited to this section;

6 7. For interest at the rate of 10% per annum according to proof;

7 8. For costs of suit;

8 9. For such further relief as to the Court shall seem proper.

9
10 **FOURTH CAUSE OF ACTION**

11 **(COMMON COUNT(S) AGAINST MS. COBB, MR. DAVIS, and DOES 1-100)**

12 64. Plaintiff incorporates by this reference each and every allegation of paragraph 49
13 as though fully set forth herein below.

14 65. Plaintiff alleges that \$150,000.00 was furnished by him or her to the Defendants
15 Cobb, Davis, and Does 1-100 at the specific behest of said Defendants, for the use of said
16 defendants on behalf of the Plaintiff, and as to which the Defendants promised to repay the
17 \$150,000.00 to the Plaintiff, plus interest according to proof;

18 66. The reasonable value of the money provided to Cobb, Davis, and Does 1-100 was
19 \$150,000.00, plus interest thereon according to proof.

20 67. The Plaintiff is entitled to reasonable attorney's fees pursuant contract and by
21 statute, notably but not limited to Business and Professions Code Section 10238.7, according to
22 proof at the time of trial.

23
24 WHEREFORE, Plaintiff prays for relief as follows:

25 1. For the sum of \$150,000.00;

2. For simple interest at the rate of ten (10%) per annum from a date according to proof;

3. For reasonable attorney's fees according to proof;

4. For such other relief as to the Court shall seem proper.

FIFTH CAUSE OF ACTION

(BREACH OF ARTICLES 5 [TRANSACTION IN DEEDS OF TRUST] AND 6 [REAL PROPERTIES SECURITIES DEALERS] OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE), SECTIONS 10232.4, 10232.5, 10237 AND 10237.1(a)(2)(4) and (5), *inter alia*, AS TO MS. COBB, MR. DAVIS, and DOES 1-100)

68. Plaintiff incorporates by this reference each and every allegation set forth in Paragraphs 1-85 of this complaint as though fully stated herein below;

69. Plaintiff is informed and believes, and on the basis of such information and belief alleges that through and under the auspices of Cobb, Davis, and Does 1-100 in the years 2009-2012 engaged in transactions involving trust deeds, promissory notes, and real properties securities as defined in California Business and Professions Code Section 10237, 10237.1(a)(2), (4), and (5).

70. Plaintiff is informed and believes, and based on such information and belief alleges that Cobb, Davis, and Does 1-100 were acting as real property securities dealers as defined in California Business and Professions Code Section 10237.1(a)(1), because they (1) guaranteed the Plaintiff the sums involved in the note and/or deed of trust and/or the underlying contract against loss; (2) they guaranteed that payments of both principal and interest were to be paid to the Plaintiff in conformity with the terms of the note or contract; (3) to repurchase the note or contract by replacing it with another of equal value. Plaintiff further alleges that they were informed by these specific defendants, and DOES 1-100 that they, personally, were

1 registered as licensed mortgage brokers as early as 2002, when the Plaintiff first became
2 involved with said defendants, and furnished the Plaintiff with references thereto that purported
3 to substantiate this representation, on which the Plaintiff reasonably relied, to his or her
4 detriment.

5 71. Plaintiff is informed and believes, and based upon such information and belief
6 alleges that during the period 2002 through 2012 neither Cobb nor Davis nor Does 1-100 was a
7 licensed California real estate broker, nor did they operate under the license of a licensed
8 California real estate broker.

9 72. Plaintiff is informed and believes, and based upon such information and belief
10 alleges that to act as a real property securities dealer in the State of California, these specific
11 defendants and DOES 1-100 had to first obtain a real estate broker's license, which they did not
12 do.

13 73 Plaintiff are informed and believe, and on the basis of such information and belief
14 alleges that, pursuant to Business and Professions Code Section 10232.5, Cobb, Davis, and Does
15 1-100 were required to provide a statement to the lenders, Plaintiff herein, containing the
16 information set forth in section 10232.5, including but not limited to (1) the estimated fair market
17 value of the securing property as determined by an appraisal, unless waived by the lender in a
18 writing; (2) age, size, type of construction, and a description of improvements to the property; (3)
19 identity, occupation employment, income and credit data about the borrower; (4) encumbrances
20 against the property; (5) the option to apply to purchase a title insurance policy or an
21 endorsement to an existing title insurance policy; (6) a copy of a written loan application by the
22 prospective borrower; (7) provisions for servicing of the loan; (8) a detailed statement of the
23 intended use and disposition of the funds being solicited from the lender including an
24 explanation of the benefits to be directly or indirectly derived by the broker; (9) the statement
25 required to be given to the prospective purchaser by Business and Professions Code Section
26 10232.4.

1 74. Plaintiff is informed and believes, and on the basis of such information and belief
2 alleges that he or she were not provided with all of the information required as outlined in
3 Paragraph 73 of this complaint.

4 75. The Plaintiff is informed and believes, and on the basis of such information and
5 belief alleges that these specific defendants, and Does 1-100 further did not submit a copy of the
6 completed statement in Business and Professions Code Section 10131(d) or (e) to the California
7 Department of Real Estate, as required by Business and Professions Code Section 10231.2.

8 76. Plaintiff are informed and believe, and on the grounds of such information and
9 belief alleges that Cobb, Davis, and Does 1-100 were actively soliciting and accepting funds to
10 be used in a loan transaction during the years 2009-2012, approximately, in which said
11 defendants were intending or did intend to obtain the use of the Plaintiff's funds other than for
12 commissions, fees, and costs and expenses. They did not provide a completed statement,
13 including the signatures of Cobb, Davis, and Does 1-100 to the Plaintiff in these regards prior to
14 accepting funds from the Plaintiff, as they were required to do under Business and Professions
15 Code Section 10231.2.

16 77. Plaintiff is informed and believes, and on the basis of such information and belief
17 alleges that Cobb, Davis, and Does 1-100 did not comply with the statutory requirements for
18 servicing of promissory notes involved in their transactions with the monies deposited with them
19 by the Plaintiff, including obtaining written authorization and periodic accountings, as required
20 by Business and Professions Code Section 10233, and not limited to the authorizations and
21 accountings.

22 78. Plaintiff is informed and believe, and based upon such information and belief
23 alleges that most of the deeds of trust supposedly executed to secure the loans of the Plaintiff
24 were not recorded, if any at all were, as required by Business and Professions Code Section
25 10234, nor were the recorded deeds, if any were recorded, made available to the Plaintiff, as
26 required by Business and Profession Code Section 10234.

79. Permission for a civil action for damages to be filed against Cobb, Davis, and Does 1-10 is expressly provided for violation(s) of Article VI [Real Property Securities Dealers] including, by reference back, but not limited to those specific provisions of Article V (Transactions in Trust Deeds) cited in Section 10237.4, and elsewhere according to proof.

WHEREFORE, Plaintiff prays for damages as follow:

1. For return of the sum of \$150,000.00, or more, according to proof;
2. For disgorgement of any commissions, fees, or profits made by Cobb, Davis, and DOES 1-10 during the approximate years 2009 to 2012;
3. For an Order directing the District Attorney of the applicable counties and States to take appropriate action against the defendants, according to proof;
4. For general damages according to proof;
5. For punitive damages according to proof;
6. For reasonable attorney's fees according to proof;
7. For simple interest at the legal rate of ten (10%) per annum on the sum of \$150,000.00 according to proof;
8. For appointment of a Receiver to take control of the books, records, and assets of the defendants;
9. For an accounting of the \$150,000.00;
10. For costs of suit;
11. For such other relief as may be appropriate.

**SIXTH CAUSE OF ACTION
(FRAUD AND DECEIT (MISREPRESENTATIONS AND CONCEALMENTS) AS TO
MS. COBB, MR. DAVIS, AND DOES 1-50)**

1 80. Plaintiff hereby incorporates by this reference all previous allegations set forth in
2 paragraphs 1-63 and 68-79, as though fully stated below.

3 81. Vandyk Mortgage Corporation in 2008/2009 made it a condition for employing
4 Cobb as its Branch manager in Mill Valley, California, Larkspur, California, and Las Vegas,
5 California, that she bring her "book of business" [writer's quotation marks] or "consistent active
6 pipeline" [phrase used by Vandyk in its advertising], also known as D.M. Financial, of contacts
7 and potential prospects for loans into the marketing activity of the branch(s) for which she was
8 the qualifying officer in charge. By book of business and consistent active pipeline was meant
9 that on-going set of customers, including the Plaintiff herein, with which Cobb dba D.M.
10 Financial had been or was doing business in arranging bridge loan mortgages at the time of and
11 after her employment by Vandyk.

12 82. Following her employment by Vandyk in 2009, all business activities conducted
13 by Cobb under the name D.M. Financial, specifically including her previous loan origination and
14 bridge loan arranging were conducted exclusively for the benefit of and on behalf of Vandyk.
15 These activities were known, assisted, encouraged, condoned and/or ratified by Vandyk through
16 Cobb's employment with Vandyk.

17 83. Without the foregoing book of business and bridge loan activities conducted by
18 Cobb dba D.M. Financial, Vandyk would not have employed Cobb.

19 84. At various times in the years 2011 and 2012, written and oral representations were
20 repeatedly made directly or indirectly by the Defendants Cobb and Davis, and each of them, to
21 the Plaintiff that these defendants would place the investment money of Plaintiff into sound
22 second mortgage bridge loans, evidenced by promissory notes, secured by real property, and
23 supported by credit reports and other writings regarding the borrowers on forms provided by
24 Vandyk, appraisals, background checks, and other types of reports evidencing the bona fides of
25 the investment. Plaintiff was promised high interest yields of ten to eleven and a half percent.

1 and the return of his or her monetary investment at the end of the short-term loan(s). Defendants
2 also offered to “roll-over” the loans into further bridge loan investments.

3 85. Plaintiff is informed and believes, and on the basis of such information and belief
4 alleges that Vandyk did have written policies in place from the beginning of Cobb’s employment
5 in 2009 until her resignation on December 31, 2012, which pro forma required its branch
6 managers to desist from outside employment in the fields of banking and real estate, that is,
7 independent from Vandyk, because, technically, such employment represented a potential
8 conflict of interest and was proscribed by the rules and regulations of the Federal and state
9 agencies which had the right of supervision and oversight of the mortgage lending activities of
10 Vandyk, such as the Federal Housing Administration, the Veterans Administration, Fannie Mae,
11 and other agencies, according to proof.

12 86. When Cobb joined Vandyk as its branch manager in 2008/09, in theory, these
13 bridge loan activities ceased to be a **form** of outside employment, and instead became an
14 **integral** part of her marketing work done exclusively for Vandyk. The name or “brand” known
15 as D.M. Financial was to be used interchangeably with that of “Vandyk Mortgage.” Plaintiff is
16 informed and believes, and on the basis of such information and belief alleges that neither the
17 NMLS nor the California Commissioner of Corporations approved the use of the name, D.M.
18 Financial, as a name or brand under which Vandyk could conduct business, and plaintiff alleges
19 that the fact that it was so used by Cobb on behalf of Vandyk, with Vandyk’s constructive and
20 actual knowledge, was kept from these regulatory bodies. The use of alternate names by branch
21 managers was a common practice by Vandyk, which by 2012 used approximately 20 such names
22 in conducting its business through its branch managers. Plaintiff is informed and believes, and
23 based on such information and belief alleges that the continued use of the prior business names
24 of its loan originators, before they were hired by Vandyk, was a common practice to keep the
25 former business’ contacts and relationships intact, and thus ensure a steady flow of borrowers to
26 Vandyk.

1 87. Vandyk did in fact expect and require Cobb to retain her bridge loan activities as
2 D.M. Financial after her employment in 2009, but not to directly derive profit, commissions, or
3 other compensation from those activities, thereby allowing Cobb and Does 1-10 orally to inform
4 Plaintiff that Cobb would not receive a loan origination fee from the transactions in which the
5 Plaintiff was involved, but would only derive monetary compensation from referrals to Vandyk
6 through loan applications made to Vandyk, if the loan(s) were in fact approved and made by
7 Vandyk. This representation was made to the Plaintiff by Cobb and Does 1-10 in 2011 and
8 2012.

9 88. In making these oral or written representations to the Plaintiff, COBB and Does 1-
10 10 were acting as the ostensible agents or employees of Vandyk, and with the knowledge,
11 support, assistance, and encouragement of the latter.

12 89. Plaintiff was informed by Cobb, **in her capacity of a Vandyk branch manager**,
13 in writing, by telephone, by email, and/or orally in the years 2011 and 2012, and at other times
14 according to proof, that his investments of money would be held in a bank escrow or trust
15 account under the name of D.M. Financial, which would be supervised by Cobb directly until the
16 monies were distributed to qualified borrowers, but not until the pre-conditions of such loans
17 were investigated, checked, and verified, by such means as credit reports, background checks,
18 financial statements, and the like.

19 90. Plaintiff was orally informed and otherwise led to believe in 2011 and 2012 by
20 Cobb and/or Davis that these functions and activities were performed under the aegis, control,
21 and supervision of Vandyk Mortgage Corporation. Cobb and Davis each informed the Plaintiff,
22 while soliciting him or her for second mortgage investments in bridge loans, that there existed
23 no distinction between Cobb, D.M. Financial and Vandyk, and that these entities were "one and
24 the same" or "the same thing."

25 91. Plaintiff justifiably came to believe by 2009 or 2010, based on the foregoing
26 representations by Cobb and/or Davis, that the second mortgage loan activity previously carried

1 on by Cobb and Davis, had become an integral part of Vandyk coincident with Ms. Cobb's
2 employment as a Vandyk branch manager, and that such activities and their investments would
3 be conducted with the consent, knowledge, and under the control of Vandyk through its
4 employee and agent, Diane Cobb. Plaintiff relied on these representations based on his prior
5 experience with Cobb, on the fact that she was a Vandyk branch manager, and on the basis of
6 the national advertising by Vandyk and its extended branch system of offices.

7 92. Plaintiff's belief and reliance on these representations was further supported by
8 the fact that when Plaintiff called Cobb and/or Davis, it was answered in the name of "Vandyk
9 Mortgage," that various loan forms had the imprimatur of Vandyk, that Plaintiff's close friend,
10 Dawn Perry, was in more direct contact with Cobb who, knowing of Plaintiff's personal
11 relationship with Ms. Perry, reiterated the above representations so that these statement would be
12 taken back to the Plaintiff.

13 93. Plaintiff was also informed in 2011 and 2012 by writings, emails, advertising, and
14 orally that Cobb and Vandyk would adhere closely to state and federal laws, statutes, and
15 regulations, as well as to the best practices of the industry, the standards of care, and the code of
16 ethics of the mortgage lending industry. Vandyk advertised continuously and nationally via the
17 Internet that it would do all of these things, including keeping "risks in check, "

18 94. Vandyk also represented to the plaintiff that it possessed the back-up staff, computer
19 mechanisms, interrelated software, and head office and regional guidance to ensure that these
20 representations were carried out. Vandyk constantly assured the public, which included the
21 investors, through its internet advertising and website that its "ethics, business practices and
22 communications are held to the highest standards." These representations were made in the years
23 2011 and 2012, and at other times according to proof, largely through Vandyk's website which
24 was visited by the plaintiff in the years 2011 and 2012.

25 95. Plaintiff is informed and believes, and on the basis of such information and belief
26 alleges that these representations were false, deceptive or misleading as to the activities

1 conducted by Vandyk, Cobb, and Davis. Vandyk did not maintain any supervision or control
2 over Cobb's second mortgage activities; its focus was on the loan applications presented to it as
3 processed by Cobb, not on the means by which such prospective borrowers were obtained.
4 Vandyk knew that Cobb maintained a bank account(s) in the name of D.M. Financial, and
5 received money from her investors which she was to hold in trust or escrow, but it maintained no
6 oversight over the account(s), thereby facilitating the absconding of funds from these accounts
7 by Cobb and Davis. Most, if not all of the tools which Vandyk publicly represented were
8 available to maintain control over the activities of its branch offices were in fact not employed to
9 supervise the activities of Cobb in regard to her investors, even though these activities—bridge
10 loans—were expected by Vandyk to continue as a part of COBB's employment.

11 96. By quality control over the activities is meant possessing and maintaining
12 knowledge and strict oversight of the second mortgage bridge loan investors' names, addresses,
13 contact data, and investments made through the auspices of Ms. Cobb.

14 97. The true facts were that while Vandyk had as its business model a plan whereby it
15 would hire former independent loan originators as its branch managers and would obtain their
16 book of business and active pipeline of contacts, it would in fact maintain a virtually completely
17 hands-off approach to their continued manner of operation, allowing the new managers to
18 maintain their previously outside business activities and names without inspections, monitoring,
19 supervision, auditing, review, investigation, and reporting to the National Mortgage Lending
20 System and Registry (NMLS).

21 98. This hands-off approach was concealed from the Plaintiff, who had been led to
22 believe by Vandyk's website that it would adhere closely to the rules and regulations of the
23 mortgage industry, would scrutinize and be responsible for the activities of its employees and
24 agents, and had the mechanisms in place to accomplish these tasks. In fact, it did not monitor,
25 scrutinize, or oversee the activities of Ms. Cobb in regard to her bridge loan investment activity,
26 let alone take responsibility for her actions in that regard.

1 99. Had Vandyk employed these “mechanisms” with regard to the activities of Cobb,
2 plaintiff alleges that the thefts of his/her money by Cobb and Davis would not have been possible
3 in the time period of 2009-2012, that is, by knowing the investor’s name, the size of his
4 investments, monitoring the trust account into which his monies were placed, and by conducting
5 periodic audits of these accounts and of the underlying real estate bridge loan transactions, it
6 would have been virtually impossible for Cobb and/or Davis to embezzle the investor’s monies.
7 Plaintiff alleges that the rules of the National Mortgage Lending System and Registry (NMLS)
8 required its members to maintain such controls, and report any violations to the NMLS, which
9 would in turn refer the violations to the appropriate regulatory agencies for appropriate
10 enforcement.

11 100. As to this Plaintiff, most of the deed(s) of trust in 2011 and 2012 were forgeries,,
12 the promissory notes underwriting the deeds of trust were fraudulent (even naming other
13 investors as non-existed borrowers), the identities of persons ostensibly borrowers were stolen,
14 and the Plaintiff’s money was diverted to the use and benefit of Defendants Cobb and Davis, and
15 each of them. This practice would have been highly likely to be discovered had Vandyk even
16 half-heartedly applied the monitoring, auditing, and supervisory controls referenced in the
17 marketing/advertising of Vandyk.

18 101. Cobb and Davis’ wrongful acts resulted in the Plaintiff suffering out-of-pocket
19 losses of no less than \$150,000.00, plus lost interest, and fees and expenses, all in an exact
20 amount to be determined at the time of trial hereon.

21 102. As a direct and proximate result of the fraud and deceit of Cobb and Davis, and
22 Does 1-100, the Plaintiff suffered significant emotional distress, anxiety, shock, and other
23 general damages in a sum according to proof.

24 103. The wrongful acts and concealments of Defendants Cobb and Davis in particular
25 were despicable and malicious, and with the intent to defraud, and Plaintiff is entitled to punitive
26

1 and exemplary damages from said defendants, and each of them, and DOES 1-100, in an amount
2 to be determined according to proof.

3
4 WHEREFORE, Plaintiff prays for relief as follows:

- 5
6 1. For compensatory damages of no less than \$150,000.00;
7 2. For other economic losses in an amount according to proof at the time of trial;
8 3. For general damages according to proof;
9 4. For pre-judgment interest according to proof;
10 5. For costs of suit herein incurred as provided by law;
11 6. For an accounting;
12 7. For punitive and/or exemplary damages according to proof;
13 8. For such other relief which the Court may deem necessary, just and proper.

14
15 **SEVENTH CAUSE OF ACTION**
16 **(PROFESSIONAL NEGLIGENCE AS TO VANDYK MORTGAGE CORPORATION AND**
17 **DOES 1-100 BASED ON NEGLIGENT HIRING, SUPERVISION, RETENTION,**
18 **REPORTING, AND OVERSIGHT)**
19

20 104. Plaintiff incorporates by this reference Paragraphs 1-47, 69-78 of the foregoing
21 allegations, as fully set forth herein below.

22 105. Vandyk's duties of professional care as a mortgage banker/broker/loan originator
23 in the field of mortgage banking were and remain defined by a plethora of Federal statutes,
24 including the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010); the
25 Housing and Economic Recovery Act of 2008, including the Secure and Fair Enforcement of
26 Mortgage Lending Act (SAFE)12 USC Chapter 51, (July 30, 2008); Truth in Lending Act

(TILA)(15 USC 1602); Real Estate Settlement Procedures Act (RESPA)(12 USC 2607), by the NMLS policies, regulations, and rules, and by the written regulations, rules, handbooks, and policies of a number of Federal departments, including Housing and Urban Development (HUD- (the Federal Housing Administration (FHA)) and the Veteran's Administration (VA), the Office of the Comptroller of the Currency, Fannie Mae, Freddie Mac, the Bureau of Consumer Finance Protection Bureau (CFPB), and the Federal Reserve System (including the independent CFPB), but not only limited to these agencies.

106. A bridge loan such as those created and arranged by Cobb with the assistance, direct and indirect, of Vandyk is a "nontraditional mortgage product," which required and continues to require a range of "best practices" to be exercised for the benefit of both consumers and mortgage lenders, such as Vandyk. These best practices are required to be followed by both Federal agencies and their State counterparts, and are mandated to be followed by the mortgage lenders approved by the Federal and State regulatory agencies. When a loan is "nontraditional," such as the bridge loans created and serviced by Cobb with the direct and indirect assistance of Vandyk, they require a high degree of scrutiny, supervision, and oversight. The best practices were and are codified in a document called "Guidance on Nontraditional Mortgage Product Risks" produced by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. Section 1950.314.8(a) (Nontraditional Adjustable Rate and Mortgage Loan Products) of the California Residential Mortgage Lending Act, California Code of Regulations, mandate that these "best practices" be diligently pursued by those mortgage lenders, such as Vandyk, through their sponsorship, oversight and supervision of mortgage loan originators, such as Cobb. The Federal counterpart of these best practices was mandated by the Federal Reserve System and the Office of the Comptroller of the Currency, and was equally binding on its approved mortgage lenders.

107. At the State level during the years 2009 through 2012, Vandyk's duties and responsibilities were and continue to be set forth by legislation and regulations setting forth the

1 duties and responsibilities of the California Department of Finance, Department of Corporations,
2 and ancillary public services regulating the activities of mortgage loan originators, mortgage
3 bankers, and mortgage brokers, and the Bureau of Business Oversight, *inter alia*, as well as their
4 counterpart agencies in the other states in which Vandyk was and still is licensed. These laws
5 and regulations include but are not limited to the California Finance Lenders Law, California
6 Residential Mortgage Lending Act, as set forth in Chapter 3, Title 10, California Code of
7 Regulations (effective May 25, 2011).

8 108. Vandyk Mortgage Corporation, as the sponsor of Diane Cobb, its employee, at all
9 times herein mentioned, was to “exercise diligent supervision over the mortgage loan origination
10 and lending activities of every mortgage loan originator that it sponsors.” (Section 1414,
11 California Code of Regulations). It was to “[s]upervise and periodically review the activities of
12 the branch managers [it employed or sponsored].” (Section 1414(d)(1)). VanDyk, as a sponsor
13 of Diane Cobb, through a Supervisor designated by the home office was to “periodically inspect
14 each business office (branch) of the mortgage lender to ensure that its written procedures”
15 bringing the bank into compliance with mortgage lending laws and regulations were enforced by
16 each branch. (Section 1414(b) and (d)(1)(2), *inter alia*). Also see Sections 22100 and 22109.1,
17 22013, of the California Financial Code, *inter alia*.

18 109. Vandyk’s duties as a mortgage banker, loan originator, and mortgage broker were
19 and remain set out in written “codes of ethics” and “standards of care” and “best practices” by
20 such industry groups as the Michigan Mortgage Lenders Association (MMLA), the National
21 Mortgage Brokers Association (NAMB), and the Better Business Bureau, to all of which Vandyk
22 belonged at all times herein mentioned, and still belongs as a member.

23 110. Vandyk also had and has its own, internal set of rules, directives, and policies,
24 which in theory its staff were and are expected to follow at all times, particularly as regards
25 avoiding conflicts of interest by its employed personnel in its branches. It was required to
26 maintain a copy of such rules and policies in each of its branch offices.

111. Among the professional, and often ordinary, responsibilities and related duties of care that Vandyk Mortgage Corporation was expected to carry out diligently and competently were and remain the following:

(a) Thoroughly examine and investigate the background, experience, financial bonafides, and other qualifications of their staff, particularly senior staff such as branch managers, who they were considering hiring, or already had hired, and to do so on at least an annual basis, as well as throughout their employment on a continuing basis. The California Finance Law Code of Regulations, section 1950.122.5 required Vandyk to "Ascertain (by investigation) the character, business reputation and experience of any individual mortgage loan originator, prior to executing any transaction on behalf of the residential mortgage lender . . ."

(b) Ensure that no staff member, again particularly senior staff, such as Diane Cobb, had a potential or real conflict of interest relative to Vandyk, the Federal or State departments and agencies with which Vandyk did business, and the customers and clients, actual or prospective, of Vandyk, be they direct customers and clients, or indirect and/or prospective customers and clients. Vandyk was to ensure, pursuant to its own internal policies and rules, that no staff held a position in real or potential conflict of interest in banking, real estate, and related fields.

(c) Periodically audit the books of account of its branches, including those of any activity conducted by its branch managers, such as Cobb, which are in banking, real estate, and related fields, and are specifically used to enhance or promote the first mortgage/brokering business of Vandyk, including the garnering of customers or prospective customers, particularly where this activity is known or suspected to exist by Vandyk. Vandyk was aware that Cobb was continuing to arrange her bridge loans as a means of developing a range of contacts who might be interested in a first mortgage from Vandyk. In that context, the Real Estate Settlement Practice Act (RESPA) to which Vandyk was required to adhere by all of the Federal agencies which approved and/or insured its loans), required that an escrow account be established for each

1 transaction. An escrow account analysis must be conducted by the servicer, who in this case
2 was Diane Cobb, and should generate a trial running balance and related computations, so that
3 there are no open questions of what monies came or were disbursed. Since Cobb was both the
4 loan originator and the servicer of the bridge loans she arranged with the assistance and
5 facilitation of Vandyk, it was Vandyk's duty to periodically conduct an escrow loan analysis or
6 other means of accounting or audit by direct examination. Even a minimal check would have
7 established the modus operandi by which Cobb received monies from investors, deposited those
8 proceeds with a depository bank, disbursed the proceeds to the borrower, and serviced the
9 monthly interest-only payment from the borrower to the investor, and the loan in general.

10 Related and systematic record-keeping related to Cobb's servicing functions was
11 also to be subject to ongoing Vandyk scrutiny and enforcement.

12 The Department of Housing and Urban Development is charged with the duty of
13 overseeing the implementation and enforcement of RESPA practices, along with the applicable
14 State agencies. As a sponsoring mortgage lender of Diane Cobb to the National Mortgage
15 Lending System and Registry (NMLS), Vandyk also had the responsibility of overseeing her
16 compliance with RESPA, as well as adhering to all other Federal laws, for that matter).

17 (d) Regularly perform a thorough inspection of their branch offices in person by an
18 area or field representative of Vandyk to ensure that the office, including its equipment,
19 computers, telephone, and software is being used solely by Vandyk personnel, and for no other
20 and potentially conflicting purpose(s) and use(s), and to prepare a written report on such field
21 inspection to headquarters.

22 (e) Conduct periodic investigations of the personal financial status, including their
23 private credit stability, bank accounts, trust accounts, and escrow accounts of its branch
24 managers to ensure that these individuals have or pose no actual or potential conflict with
25 customers or prospective customers of Vandyk.

(f) Conduct periodic investigations of the branch offices to ensure that there is no commingling of funds as between the branch manager and the staff personnel in the branch offices by way of salaries, commissions, and other financial support.

(g) Ensure that the branch office staff were working solely for Vandyk, and not in the fields of mortgage banking, real estate, or related fields such as would pose a real or potential conflict of interest with Vandyk and/or its actual or prospective customers, or violate Federal and/or State laws and regulations.

(h) Ensure that no personal financial commitments of their own were or are made by any Vandyk personnel, including the branch manager, to real or potential customers of Vandyk.

(i) Ensure that its branch office personnel comply fully with all aspects of Federal and State law in the performance of their duties.

(j) Report at least annually, fully, and accurately on all of the activities of their branch offices used to promote the business of Vandyk.

(k) Review at least annually, fully and diligently, the submissions of their loan officers and mortgage loan originators, such as Cobb, to the NMLS.

(l) Report in detail at any time discovered to the NMLS any real or suspected deviations from the duties of care as listed above, but not limited to these.

(m) Vandyk should have had in place monitoring systems to detect employee conduct that conflicts with the bank's general responsibility as a fiduciary, and it had and has a continuing duty to identify existing and/or potential problems, and examine the legality of its branches' arrangements, procedures, and methods to locate prospective borrowers for first mortgage loans. It should have had a well-enforced ethics policy, identified clearly prohibited activities, and delineated clear guidelines for avoiding conflicts of interest and self-dealing. (*See Comptroller's [of the Currency] Handbook on Conflict of Interest (June, 2000)*).

112. Vandyk breached its professional duties of care by the following acts or omissions to act, *inter alia*:

1 (a) Vandyk did not conduct a full and thorough investigation of the background,
2 including her financial bonafides, of Diane Cobb, individually and dba D.M. Financial, including
3 previous operations in Tennessee and Washington State, initially while first hiring Cobb to be
4 the branch manager's Vandyk's Mill Valley office, and continuing thereafter in Larkspur and
5 Las Vegas.

6 (b) Vandyk did not investigate Cobb's activities dba D.M. Financial sufficiently to
7 establish that her manner of operating this activity posed a real and/or potential conflict of
8 interest to Vandyk, its customers, and to the Federal and State agencies to whose statutes,
9 regulations, and rules Vandyk (and Cobb) subscribed.

10 (c) Although aware that Cobb was marketing Vandyk's business through her second
11 mortgage bridge loan activities, Vandyk performed no investigation, accounting, examination, or
12 audit of these activities, notwithstanding that these activities fell entirely within a mortgage
13 banking, real estate, or related field, and thus were proscribed.

14 (d) Vandyk did not perform *in situ* inspections of any of Cobb's branch offices.

15 (e) Vandyk did not perform any and/or sufficient investigations or inquiries of
16 Cobb's personal financial status, which necessarily included her second mortgage activities
17 through D.M. Financial.

18 (f) Vandyk did not perform any inspection or other investigation to determine
19 whether Cobb's branch offices to determine whether staff were receiving other compensation
20 from sources in the banking, real estate, or related fields.

21 (g) Vandyk did not perform any inspection or other investigation to determine
22 whether persons in Cobb's branch offices, including Cobb herself, were working in an outside
23 activities in the banking, real estate, or related fields.

24 (h) Vandyk did not perform any inspection(s) or other investigation to determine
25 whether Cobb and other staff were making personal financial commitment to prospective
26 customers of Vandyk, such as guaranteeing that their investments would be repaid.

1 (i) Plaintiff is informed and believes, and on the basis of such information and belief
2 alleges that Vandyk did not examine carefully and in detail Cobb's annual submissions to the
3 NMLS.

4 (j) Plaintiff is informed and believes, and on the basis of such information and belief
5 alleges that Vandyk did not report to the NMLS the fact that it was utilizing the second mortgage
6 activity used by Cobb to promote the business of Vandyk, even though it knew or should have
7 known that such activity was taking place.

8 (k) Vandyk did not examine the operations of Cobb's branch offices sufficiently to
9 determine that such offices were being used simultaneously by her to promote her second
10 mortgage activity as well as Vandyk's loan processing.

11 (l) Vandyk placed either no limitations or insufficient limitations on Cobb in regard
12 to the promotional use by her of the Vandyk name, brand, and reputation.

13 (m) In performing the vetting of Cobb in 2008, and annually thereafter, Vandyk
14 knew, could have learned or discovered, and should have known or learned by a minimum of due
15 diligence that the funding by which Cobb provided the monies to borrowers of its second
16 mortgage bridge loans was sent directly to Cobb dba D.M. Financial and was thence to have
17 been deposited in accounts held under trust for the purpose of making such loans.

18 (n) Vandyk by its negligent failure to supervise and oversee the activities of the
19 branches administered by Cobb allowed her to use the name D.M. Financial interchangeably
20 with "Vandyk Mortgage," even though the former had never been approved by the
21 Commissioner of Corporations for use by Vandyk, as the sponsor of Cobb to the NMLS.

22 (o) Vandyk failed to follow the "best practices" of the Guidance on Nontraditional
23 Mortgage Product Risks, by carefully and diligently reviewing the legitimacy and accuracy of
24 the bridge loans arranged by Diane Cobb, even though it knew or should have known that these
25 mortgage loans held risks related to income, asset verification, and reduced documentation, and
26 exposed providers to increased risks relative to traditional mortgage loans.

1 (p) Vandyk failed to put in place in its branch offices and to enforce rigorous
2 policies, controls, and procedures to regulate, control, and eliminate the real and potential risks
3 for conflicts of interest of its branch personnel, such as Cobb, which failures were in no small
4 part responsible for the depredations of Cobb and Davis.

5 113. Vandyk knew, could have learned, and should have known or learned in the
6 approximate period 2008 – 2012, by a minimum of due diligence, that Cobb and Does 1-100 was
7 the sole signatory and supervisor of said trust account(s).

8 114. Vandyk knew, could have learned, and should have known or learned in the
9 approximately period 2008 – 2012, that Cobb had a habit, pattern, and practice of withdrawing
10 investors' money out of these accounts for Cobb's personal benefit.

11 115. Vandyk knew, could have learned, and should have known or learned that Cobb
12 in the period 2008 – 2012, was performing no auditing or other form of independent verifying of
13 these trust accounts from the private investors, such as the Plaintiff herein.

14 116. Vandyk knew, could have learned, and should have known or learned that the
15 accountant for Cobb dba D.M. Financial from 2008 through 2012 was Paul Sloane Davis, who
16 was a partner with Cobb as to the bridge loan investment scheme.

17 117. Vandyk knew, could have learned, and should have known or learned that many if
18 not all of the second mortgages arranged by Cobb during the period 2008 – 2012 were not
19 secured by *recorded* deeds of trust, and were in fact forgeries, as were accompanying promissory
20 notes by the simple expedient of asking to review them. Vandyk as the sponsor of Cobb to the
21 NMLS and as Cobb's employer, had the absolute right to demand such access to Cobb's books
22 and records.

23 118. Vandyk knew, could have learned, and should have known or learned that many
24 of the borrowers of the bridge loans arranged by Cobb from 2008 through 2012 were non-
25 existent, or were invented by Cobb, and supported by forged promissory notes and deeds of trust.

1 119. Vandyk knew that Cobb was using the name and reputation of Vandyk to
2 continue its prior activity of arranging bridge loans in such a way as to enhance the legitimacy
3 of her bridge loan activities, and it also knew that no approval for the use of D.M. Financial as an
4 alternative name or brand for Vandyk had not been approved by the NMLS or the California
5 Commissioner of Corporations.

6 120. Vandyk knew, could have learned, and should have known or learned by the
7 exercise of minimal due diligence and investigation/inspection of offices used by Cobb that
8 during the period 2008–2012, that Cobb was using its offices, employees, equipment, computers,
9 software, and other things and services to promote her bridge loan activities as a means to
10 develop borrowers for its first mortgage. At all times mentioned herein, Vandyk had a
11 Supervisor who was responsible for overseeing the branch offices maintained by Cobb, but in
12 fact used him primarily if not only for the purpose of facilitating the processing of first mortgage
13 applications and related issues.

14 121. Plaintiff alleges that the failure to carry out the above duties of care, and the
15 completely free hand given Cobb to continue to conduct her business under the aegis of Vandyk
16 in the name of D.M. Financial created a situation, along with other factors herein above cited, in
17 which it was eminently foreseeable that misappropriation of Plaintiff funds could, and did, occur.

18 122. If the hands-off behavior and oversight of Vandyk in maintaining a network of
19 unsupervised so-called “branch offices,” as existed in the case of Cobb, and likely other branch
20 offices of Vandyk, according to proof, is not corrected by this instant action, the likelihood of
21 similar harm occurring to other persons in like circumstances is great. This action is therefore
22 brought, among other things, to prevent such future harm to persons unknown.

23 123. Plaintiff further alleges that the burden on Vandyk of being required by the
24 outcome of this case to exercise closer scrutiny, care, and oversight of its branch offices will be
25 minimal, with few if any consequences to the mortgage banking community and the public, if
26

1 any there be at all relative to the likely damage caused by a continuation of Vandyk's practices
2 as detailed in this complaint.

3 124. Plaintiff alleges that Vandyk had, at the least, constructive knowledge of the
4 consequences of their failure to oversee and investigate carefully the background, acts and
5 omissions to act of Cobb, and in such manner acted in reckless indifference to the results of their
6 conduct. Plaintiff alleges that Vandyk, in avid pursuit of a business model that promised little
7 or no oversight of the way in which its branch managers pursued prospective customers, is
8 deserving of great moral blame, as well as complete liability to the Plaintiff for his or her
9 financial losses.

10 125. But for the reckless and thoroughly negligent manner in which Vandyk exercised
11 control and oversight of Cobb's branch offices, the losses to Plaintiff in the years from 2009 to
12 2012, would not have happened. Had it properly exercised close oversight of Cobb, and through
13 this preventative act, disciplined Cobb and reported her derelictions to the responsible authorities
14 at the NMLS, the Federal enforcement agencies, and the regulating State agencies, the damages
15 to the Plaintiff would not have taken place.

16 126. Plaintiff alleges that because of its failure to exercise prudent oversight of COBB's
17 Las Vegas office, VANDYK on information and belief failed to discover that COBB had a
18 gambling addiction [as COBB admitted in Federal open court], which was supported by her free
19 access to Plaintiff's funds and was a motivating factor in her moving to Las Vegas.

20 127. VANDYK, also, because of its lack of supervision of Cobb's activities, failed to
21 learn that WestAmerica Bank had asked Cobb to discontinue her D.M. Financial account with
22 them shortly prior to her moving to Las Vegas, which would have raised a red flag had
23 VANDYK learned of the bank's actions.

24 128. Defendant Vandyk's negligent conduct was a direct and proximate cause of
25 Plaintiff, and each of them, suffering out-of-pocket losses, lost interest, and fees and expenses,
26 all in an amount to be determined at the time of trial hereon, but no less than \$150,000.00.

1 129. As a proximate result of the defendant Vandyk's professional negligence, the
2 plaintiff suffered mental anguish, shock, surprise, disappointment, and anger, and is therefore
3 entitled to an award of general damages against Vandyk in a sum according to proof.

4 130. Plaintiff alleges that he is entitled to an award of interest at the legal rate in the
5 State of California of ten (10%) per annum from a date or dates according to proof.

6
7 WHEREFORE, Plaintiff prays for relief as follows:

- 8 1. For damages of no less than \$150,000.00;
9 2. For general damages in a sum according to proof;
10 3. For interest at the rate of ten (10%) per annum according to proof;
11 4. For costs of suit;
12 5. For such other and further relief, as may be proper and appropriate.

13
14 February 18, 2015

15
16 

17 Attorney for Plaintiff
18 STEVE THIEME