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## Oral Argument in Meyer v. Holley (No. 01-1120)

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## Oral Argument in Meyer v. Holley (No. 01-1120)

### Notes/Citation Information

Transcript of Oral Argument, *Meyer v. Holley*, 537 U.S. 280 (2003) (No. 01-1120).

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   DAVID MEYER, INDIVIDUALLY           :  
4    AND IN HIS CAPACITY AS            :  
5    PRESIDENT AND DESIGNATED         :  
6    OFFICER/BROKER OF TRIAD,         :  
7    INC., ETC.,                       :  
8                    Petitioner                :

9            v.                                :   No. 01-1120

10   EMMA MARY ELLEN HOLLEY,            :  
11    ET VIR, ET AL.                        :

12   - - - - -X

13    Washington, D.C.

14    Tuesday, December 3, 2002

15                    The above-entitled matter came on for oral  
16   argument before the Supreme Court of the United States at  
17   10:04 a.m.

18   APPEARANCES:

19   DOUGLAS G. BENEDON, ESQ., Woodland Hills, California; on  
20        behalf of the Petitioner.

21   ROBERT G. SCHWEMM, ESQ., Lexington, Kentucky; on behalf  
22        of the Respondents.

23   MALCOLM L. STEWART, ESQ., Assistant to the Solicitor  
24        General, Department of Justice, Washington, D.C.; on  
25        behalf of the United States, as amicus curiae,

1 supporting the Respondents.

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22  
23  
24  
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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
DOUGLAS G. BENEDON, ESQ.	
On behalf of the Petitioner	4
ROBERT G. SCHWEMM, ESQ.	
On behalf of the Respondents	24
MALCOLM L. STEWART, ESQ.	
On behalf of the United States,	
as amicus curiae, supporting the Respondents	41
REBUTTAL ARGUMENT OF	
DOUGLAS G. BENEDON, ESQ.	
On behalf of the Petitioner	51

1 P R O C E E D I N G S

2 (10:04 a.m.)

3 JUSTICE STEVENS: We will now hear argument in  
4 Number 01-1120, Meyer against Holley.

5 Mr. Benedon.

6 ORAL ARGUMENT OF DOUGLAS G. BENEDON

7 ON BEHALF OF THE PETITIONER

8 MR. BENEDON: Justice Stevens, and may it please  
9 the Court:

10 The question -- excuse me. The question  
11 presented should be answered with the following bright  
12 line rule: Imposition of vicarious liability under the  
13 FHA should be determined by application of established  
14 rules of corporate and agency law not criteria unique to  
15 the FHA. Under these principles, corporate shareholders  
16 and officers are not vicariously liable for the torts of  
17 the other agents of the corporation.

18 The Ninth Circuit held that a different rule  
19 should apply under the FHA, that vicarious liability could  
20 be based on control alone. That is not, nor should it be,  
21 the law.

22 While the starting -- the starting point for the  
23 analysis is necessarily the statute itself, while Congress  
24 has authority to expand the class of persons liable for  
25 violation of a Federal law, when it has done so, it has

1 done so expressly. The FHA was never -- which neither  
2 defines nor expands the class of persons liable under the  
3 act, and as this Court stated in Bestfoods, this silence  
4 is dispositive.

5 Specifically, Congress has spoken directly when  
6 it has wished to impose a control test. For example --

7 QUESTION: Suppose -- suppose that I were to  
8 agree with you and the Court were to agree with you as to  
9 your criticism of the Ninth Circuit's reasoning and -- and  
10 that it agreed with you too that general principles of  
11 agency and corporate liability apply. Based on this  
12 record, could we go on to say that under California law  
13 and real estate law generally, the real estate salesman is  
14 the agent of the broker, and therefore the broker is  
15 liable under agency law?

16 MR. BENEDON: The answer --

17 QUESTION: Or -- or would I have to -- would we  
18 have to remand before we did that? Because this is  
19 discussed in the -- in the respondents' brief, and the  
20 respondent makes it quite clear. And maybe you disagree,  
21 but the -- the law is cited on page 15 of the red brief,  
22 that under California law, the broker is the principal.  
23 And I take it the principal would be liable under  
24 respondeat superior in this case.

25 MR. BENEDON: Correct, Your Honor.

1           QUESTION:  If -- if we find who the principal  
2 is, we know the principal is going to be liable.

3           MR. BENEDON:  That's where --

4           QUESTION:  Under California law the broker is  
5 the principal.

6           MR. BENEDON:  My -- Your Honor, my answer to  
7 that is -- is several-fold.

8           First, the distinction needs to be made between  
9 a corporate broker and an individual broker.  Mr. Meyer in  
10 this case is a corporate officer who holds a broker's  
11 license solely as the officer of the corporation.  The  
12 corporation is the employer of the agent.  The agent  
13 operates under the license held by the corporation.

14          QUESTION:  But isn't it fair to say that -- or  
15 isn't it?  Maybe you'll take issue with this, that the  
16 corporation operates as a broker only because it has the  
17 individual's broker license assigned to it.

18          MR. BENEDON:  It has to, Your Honor.  
19 A corporation as a paper person needs human beings to  
20 fulfill the function that a corporation must do, as does  
21 any corporation.  There will always be supervising  
22 officers --

23          QUESTION:  Is -- is there any California law  
24 saying that -- that the corporation is the principal in a  
25 situation like this and not the holder of the -- not



1 the -- not the named broker?

2 MR. BENEDON: The named broker, again -- to  
3 answer your question, no, not that I'm aware of.

4 QUESTION: This -- this is a --

5 QUESTION: Let me ask the opposite. Is there  
6 any California case in which the named broker in the  
7 corporation has been held liable as the principal solely  
8 because he's the named broker?

9 MR. BENEDON: Not the designated officer, Your  
10 Honor. The corporation has been held liable.

11 QUESTION: Yes. That's what I'm talking about.

12 MR. BENEDON: But not the designated  
13 officer/broker.

14 QUESTION: So --

15 QUESTION: Is there a difference in the  
16 licenses, the individual license that Justice Kennedy was  
17 referring to and that's mentioned on page 15 of the red  
18 brief, the individual broker license and the statement  
19 that the individual broker licensee is vicariously  
20 liable and the broker who holds the license under the  
21 corporate name? Are those different certificates?

22 MR. BENEDON: Absolutely, Your Honor. There are  
23 separate licenses issued by the Department of Real Estate  
24 in California: one to individuals who act as brokers, and  
25 one to individuals who are brokers only in their capacity

1 as officers of a corporation. Those are separate  
2 licenses.

3 The only license in this cases was held by  
4 Mr. Meyer as an officer of the corporation. He could not  
5 step outside the corporation and act as a broker. His  
6 existence as a broker depended on the corporation. He  
7 could not transact --

8 QUESTION: May I ask you this question? You  
9 explained to Justice Scalia that there is no California  
10 case holding a corporate broker liable in this situation,  
11 as I understand. Are there any California cases going the  
12 other way? Has it ever -- has the issue ever been  
13 presented to the California courts?

14 MR. BENEDON: Yes, it has, Your Honor. In two  
15 cases, there have been, one -- one State case and one  
16 district court case cited in our -- in our briefs, in  
17 the -- re Grabau case. They've held that the California  
18 statutory scheme imposes only a disciplinary remedy for  
19 any violations of the scheme such that a broker -- a  
20 designated officer/broker who violates any of the  
21 provisions of the statute may be subject to discipline,  
22 but is not the basis of a civil action.

23 QUESTION: So in this case the individual could  
24 be subject to discipline, but not to liability. Is  
25 that --

1 MR. BENEDON: Correct.

2 QUESTION: Yes.

3 QUESTION: What were your other reasons. You  
4 said you -- you had a multi-faceted answer, or something  
5 like that. What -- what are the other --

6 MR. BENEDON: The --

7 QUESTION: -- prongs or the other facets of your  
8 answer?

9 MR. BENEDON: The other facets is that liability  
10 under the FHA cannot be premised on California agency law.  
11 There, the -- the agency under the FHA is determined on  
12 Federal rules of agency. To determine Federal agency,  
13 this Court held in General Contractors, you look to the  
14 Restatement which has a two-prong test. One is the right  
15 of control, but the other is that the person controlled  
16 has to be acting on behalf of the principal.

17 Here, the agent works -- is working on behalf of  
18 the corporation. In this case when Mr. Crank went out and  
19 did real estate transactions, he was acting on behalf of  
20 Triad. He was not acting on behalf of Meyer.

21 The problem with looking at each State's  
22 structure is we're going to end up with a patchwork  
23 construction of a Federal statute. The law may be  
24 different in Nevada than from Oregon than from Washington  
25 than from West Virginia.

1 QUESTION: Is that --

2 QUESTION: Suppose it were the majority rule  
3 that a real estate broker is the principal for the  
4 salesman. Would we follow that rule generally?

5 MR. BENEDON: Again, Your Honor, the --

6 QUESTION: And again, I'm -- I'm referring to  
7 the red brief at pages 14 and 15 which sets this -- this  
8 out. You say there's a distinction because there's a  
9 corporate broker and -- and an individual broker.

10 MR. BENEDON: Correct.

11 QUESTION: Now, we -- I -- we can explore that a  
12 little bit. But suppose it were the -- the general rule  
13 in most of the States that had addressed the subject that  
14 the broker is the principal.

15 MR. BENEDON: To answer that question, I think  
16 you still need to make a distinction between individual  
17 brokers and corporate licensed brokers. We do not dispute  
18 that --

19 QUESTION: Well, I -- I was simply addressing  
20 the point of whether or not State law as opposed to  
21 Federal law controls. And if it's the general law in most  
22 States that the broker is the principal, then that would  
23 certainly be sufficient for the imposition of liability  
24 under this Federal scheme. Would it not?

25 MR. BENEDON: Again, I -- I disagree, Your

1 Honor. I would say that the rules still -- you need to  
2 still look at the Federal law of agency rather than how  
3 the State defines the relationship between the broker and  
4 the agent. You -- again, you look to the Federal rules of  
5 agency to determine agency under the FHA.

6 QUESTION: I thought you said those were general  
7 common law principles that are -- presumably the States  
8 would share.

9 MR. BENEDON: The general law principles applied  
10 in the broker/agent context would establish that the  
11 agent -- the sales agent -- is the agent of the principal  
12 broker when the broker is acting in his individual  
13 capacity when the agent is acting on behalf of the  
14 principal, of the individual broker, and subject to that  
15 broker's control. The situation is different when it's a  
16 officer/broker who is not -- the agent in that situation  
17 is not acting on behalf of the officer. He's acting on  
18 behalf of the corporation.

19 QUESTION: Then if I understand your argument  
20 correctly, you're saying that the discussion, whether it's  
21 California law or Federal common law, is in this case at  
22 least academic because under California law, if you were  
23 to apply it, there is no relief for these plaintiffs, that  
24 the only remedy where it's -- the license is held in the  
25 corporate name is a disciplinary sanction?

1 MR. BENEDON: To date, that is how California  
2 has treated violations of the California statutory scheme.  
3 Correct, Your Honor.

4 QUESTION: Only -- only by these corporate  
5 brokers or -- or by -- by individual brokers?

6 MR. BENEDON: Excuse me, Your Honor. Individual  
7 brokers as well.

8 QUESTION: Okay.

9 MR. BENEDON: It's a statutory scheme that  
10 applies to brokers in general and salespersons in general  
11 who -- who allegedly violate the act.

12 QUESTION: But I thought you said that if -- if  
13 this were a license to an individual broker, if this were  
14 held -- the license were held by Meyer as an individual --  
15 that he would then have a principal agent relationship  
16 with Crank. Is that not so?

17 MR. BENEDON: That is correct, Your Honor, if  
18 it's an individual broker's license.

19 I think I may have caused some confusion. Under  
20 general principles of agency law, common law principles of  
21 agency law, the sales agent is in an agent principal  
22 relationship with an individual broker. If there is a  
23 violation of the act by the broker under California law,  
24 then he would be subject to disciplinary action. That is  
25 separate and apart from vicarious liability under the FHA,

1 which would adhere based on the principal agent  
2 relationship.

3 QUESTION: Is there an issue in this case about  
4 piercing the corporate veil as a means of holding Meyer  
5 liable?

6 MR. BENEDON: Not in this case, Your Honor. We  
7 hold that the theory and doctrine of corporate veil-  
8 piercing is -- is available in the appropriate case as it  
9 would be under any case under the general common law,  
10 although here it's been -- it wasn't raised and it's been  
11 waived, and it's never been proven.

12 QUESTION: But they came --

13 QUESTION: Was there some reference to  
14 veil-piercing in the respondents' brief in the Ninth  
15 Circuit?

16 MR. BENEDON: On the last page of argument in a  
17 footnote, Your Honor, there's a reference arguing that  
18 based on sole ownership, that they could establish an  
19 alter ego, but as a matter of law, that's insufficient to  
20 establish alter ego.

21 QUESTION: Well, didn't -- refresh my  
22 recollection. Doesn't this come up on a motion for  
23 summary judgment?

24 MR. BENEDON: First a motion to dismiss, Your  
25 Honor --

1 QUESTION: Yes.

2 MR. BENEDON: -- followed by a --

3 QUESTION: Which was denied and then there was a  
4 motion for summary judgment.

5 MR. BENEDON: The motion for dismiss was granted  
6 in part, Your Honor, as to all the State law claims --

7 QUESTION: Okay.

8 MR. BENEDON: -- the 1981 claim, and it  
9 proceeded just on the FHA claim.

10 QUESTION: Right. Now, so if it came up on a  
11 motion for summary judgment, then whatever -- whatever  
12 evidence the plaintiffs were going to rely on for the  
13 veil-piercing would have had to have been brought forward.  
14 Isn't that right?

15 MR. BENEDON: Absolutely.

16 QUESTION: And what did they bring forward?

17 MR. BENEDON: Nothing, except sole ownership.

18 QUESTION: Sole ownership is the only thing --

19 MR. BENEDON: Which is in dispute. Which is in  
20 dispute. We maintain that ownership was, in fact,  
21 transferred, but we are assuming for the purpose of this  
22 proceeding that there is in fact ownership resided in  
23 Mr. Meyer.

24 QUESTION: I thought that if -- that a judgment  
25 winner, as the Holleys are at this stage, can defend the



1 judgment on another ground. In other words, the Ninth  
2 Circuit ruled in their favor and now they're saying, well,  
3 here's another theory on which we could prevail. I didn't  
4 know -- certainly they can't get an immediate victory, but  
5 if they attempt to defend the judgment on that basis,  
6 aren't they then entitled to go back and make the case  
7 rather than taking from them their victory and saying you  
8 lose? They say, but we have another theory that would be  
9 viable. Up till now, we won with this one. Why isn't  
10 that altogether appropriate they should now be given a  
11 chance to air that other theory in support of the  
12 judgment?

13 MR. BENEDON: They -- the theory was never  
14 raised below. An alter ego is in and of itself a fact-  
15 driven inquiry. Where it's -- and so the fact that it  
16 wasn't raised below, it's -- it's now been waived. It  
17 can't be raised for the first time in this Court.

18 QUESTION: Even if -- even if it had been  
19 raised, my understanding is in -- in order to have it sent  
20 back on the -- on the basis that although the court below  
21 relied on one theory, it could have relied on the other,  
22 the motion for summary judgment put the plaintiff to his  
23 proof to -- to at least come up with facts, the assertion  
24 of facts, not the demonstration of them, but the assertion  
25 of facts that would support the other theory. And the

1 only fact contained here is control. So if control is --  
2 does not suffice to pierce veils, that's the end of the  
3 case, it seems to me.

4 MR. BENEDON: That's correct. That is correct  
5 and that is our position.

6 QUESTION: I thought there were a bunch of  
7 things. I mean, the Government in its brief lists a whole  
8 bunch of things. He was the sole shareholder. He was the  
9 president. He did control it. He paid the taxes in his  
10 own Social Security number. He made various transactions  
11 that violated the terms under which it was supposed to be  
12 the corporate form, and he didn't train the person  
13 properly. I mean, they have a list of things which I take  
14 it they didn't just make up, that they're there in the  
15 record.

16 Then -- and then they say that, well, in the  
17 Ninth Circuit brief, what it says in the footnote is that  
18 evidence -- evidence will show that Meyer is the sole  
19 shareholder of Triad, and thus an argument to pierce the  
20 corporate veil would be meritorious. Well, they don't  
21 list all those things in that footnote. That's true. But  
22 we should send it back and let the Ninth Circuit decide.

23 I guess that's basically their argument, and I  
24 think I want to hear as complete a response to that as --  
25 as you have. Maybe I've heard it already.

1 MR. BENEDON: No. You -- I would like to  
2 amplify on that, Your Honor.

3 The issue of -- of alter ego that's been now  
4 raised for the first time in this -- in this Court by the  
5 Solicitor General is based on speculation beyond the  
6 showing that there was sole ownership and that there is no  
7 insurance coverage. Everything else is unsupported by the  
8 record in terms of establishing that there was a failure  
9 to adhere to corporate formalities, that there was under-  
10 capitalization. All that is speculation. And the  
11 argument boils down --

12 QUESTION: Was it not even asserted? I mean --

13 MR. BENEDON: No.

14 QUESTION: -- to survive the motion for summary  
15 judgment, you don't have to prove it, but you have to say  
16 I -- you know, I will prove it.

17 MR. BENEDON: No, it wasn't --

18 QUESTION: It wasn't even asserted.

19 MR. BENEDON: It was not even asserted. It's  
20 asserted for the first time in this Court.

21 QUESTION: Well, in the footnote -- they mention  
22 it in the footnote.

23 MR. BENEDON: They mention sole ownership in the  
24 footnote.

25 QUESTION: Well, that's -- that's -- you're

1 quite right.

2 MR. BENEDON: Yes. And for example, the --  
3 Your -- Your Honor made reference to payment of taxes.  
4 While that was alleged, it was never proven at the summary

5 judgment stage. That's just an allegation in their --

6 QUESTION: I don't know what that means. While  
7 it was alleged, it was never proven at the summary  
8 judgment stage.

9 MR. BENEDON: Right. There's --

10 QUESTION: There -- there was no evidence  
11 brought in at all to establish it.

12 MR. BENEDON: That he -- that taxes were paid  
13 under his ID? None whatsoever.

14 QUESTION: Well, was -- was there an affidavit  
15 on their side claiming that?

16 MR. BENEDON: On the other side claiming that?

17 QUESTION: Yes. How did it get raised?

18 MR. BENEDON: It was raised solely as a -- as an  
19 allegation in the complaint. And then when it came time  
20 for them to put their proof on the table, it wasn't there.

21 QUESTION: So at the summary judgment stage,  
22 they didn't rely on that is what you're saying.

23 MR. BENEDON: Correct.

24 QUESTION: They didn't. Okay.

25 MR. BENEDON: Correct.

1 QUESTION: And did you deny it?

2 MR. BENEDON: Absolutely. Absolutely. But  
3 again, it was not raised as a disputed material fact on  
4 the summary judgment, so there's no formal denial in the  
5 record because it was never raised. I'm denying it now.

6 QUESTION: And you said there was no genuine  
7 issue -- no triable issue at the summary judgment stage,  
8 that there were no facts?

9 MR. BENEDON: That there was no issue regarding  
10 payment of taxes under Mr. Meyer's personal ID number.

11 QUESTION: Well, if the question is the -- the  
12 liability of Mr. Meyer -- and at the summary judgment  
13 stage, it's not a trial. You don't prove your case at  
14 that point. It's only if there's no genuine triable  
15 issue.

16 MR. BENEDON: Right. The only issue on the  
17 summary judgment was whether or not Mr. Meyer was still  
18 the owner of Triad Corporation. The district court found  
19 not. The Ninth Circuit Court of Appeals found that there  
20 was a disputed issue on sole ownership.

21 QUESTION: But what was the relevance of whether  
22 he was the owner or not? I don't quite understand.

23 MR. BENEDON: They're claiming that that was  
24 sufficient to establish alter ego, Your Honor.

25 QUESTION: Alter ego, but not piercing the

1 corporate veil, is that --

2 MR. BENEDON: Well, I'm using those  
3 interchangeably. I apologize.

4 QUESTION: I'm sorry. I didn't understand you.

5 MR. BENEDON: I use those interchangeably.  
6 They -- both alter ego as a basis for piercing the  
7 corporate veil. They were arguing -- and in fact, the  
8 Ninth Circuit held -- that sole ownership of the  
9 corporation was enough to pierce the corporate veil.

10 QUESTION: They were arguing that. So they were  
11 arguing the pierce the corporate veil theory then.

12 MR. BENEDON: No. They -- solely based on sole  
13 ownership. Correct.

14 QUESTION: But the -- but the purpose of  
15 investigating the sole ownership issue was to determine  
16 whether or not they could pierce the corporate veil. Is  
17 that right?

18 MR. BENEDON: Based --

19 QUESTION: Which seems to me as though their  
20 issue of whether they could pierce the corporate veil was  
21 at least raised, and the question is whether their claim  
22 of sole ownership was sufficient to establish that point.  
23 Maybe I'm misunderstanding something.

24 MR. BENEDON: Right. Well, that -- that's the  
25 argument that's made in their footnote on the last page of

1 their brief is that sole ownership would establish an  
2 alter ego sufficient to pierce the corporate veil. And as  
3 a matter of law, that's -- that is insufficient.

4 QUESTION: But -- but now I'm just a little  
5 puzzled about the extent to which it was raised in the  
6 district court. Was there a debate on the -- in the  
7 district court as to whether your client was the sole  
8 owner or not?

9 MR. BENEDON: Yes, there was.

10 QUESTION: And what was the purpose of that  
11 debate in the district court? Wasn't it for the very same  
12 reason?

13 MR. BENEDON: They were trying to -- no, I  
14 disagree. I think what they were trying to establish in  
15 the district court was the -- the control exerted by my  
16 client over the corporation as opposed to saying that he  
17 should be necessarily a veil-piercing --

18 QUESTION: Well, maybe I -- I don't remember the  
19 facts correctly. But I thought that control was really  
20 not in dispute. I thought that the -- the person to whom  
21 he transferred stock didn't get all the stock, did he, or  
22 did he get just some of the stock?

23 MR. BENEDON: He got some of the stock, but  
24 ownership --

25 QUESTION: So he still would have had control.

1 MR. BENEDON: He would have partial control as  
2 a -- as a shareholder.

3 QUESTION: I see.

4 MR. BENEDON: But the -- the Ninth Circuit held  
5 that that was enough. The court -- the Ninth Circuit --

6 QUESTION: Not -- not that it was enough for  
7 piercing the veil, but that it was enough for what?

8 MR. BENEDON: It was enough to impose personal  
9 liability.

10 QUESTION: On what basis? Not on  
11 veil-piercing --

12 MR. BENEDON: No.

13 QUESTION: -- basis.

14 MR. BENEDON: Solely on sole ownership. They --  
15 the Ninth Circuit, taking a -- its lead from, I believe,  
16 the Seventh Circuit, said basically that in a situation  
17 like this where you have sole ownership, under the FHA  
18 that's enough to impose --

19 QUESTION: Okay. You don't have to pierce the  
20 veil.

21 MR. BENEDON: Correct. It's -- it's an almost  
22 per se piercing based on sole ownership.

23 QUESTION: But just returning one -- once again  
24 to the broker problem. I'm looking at Gipson versus Davis  
25 Realty, which is a case by Judge -- written by Judge



1 Molinari. It's cited on page 15 of the respondents'  
2 brief. That was a standard respondeat superior case where  
3 the broker -- pardon me -- where the salesman is in an  
4 automobile accident and they seek to hold the principal  
5 for the damages caused by the accident within the course  
6 of his employment. And this is the case where the  
7 statement is made that the broker is liable for the  
8 misconduct or -- or malfeasance of -- of the agent in the  
9 course of -- of his employment.

10 And it's a case much like this where there's a  
11 corporation that holds the license. There -- there  
12 doesn't seem to be a -- a distinction between the  
13 corporate license and -- and the broker license that you  
14 made. Is that -- was the law changed since the Gipson  
15 case, or --

16 MR. BENEDON: Not that I'm aware of, Your Honor.

17 Again, I -- I don't have the facts of that case  
18 at -- at the tip of my fingers.

19 QUESTION: Well, it was relied on in the  
20 respondents' brief.

21 MR. BENEDON: Right. But again, in that case I  
22 don't recall if it was a corporate broker or whether it  
23 was an individual broker. But if it was a corporate  
24 broker and they're holding them individually liable for  
25 the torts of the --

1 QUESTION: Well, as I understand the facts of  
2 the case, it was an individual who held the license and he  
3 operated through a corporation. That's -- that's --

4 MR. BENEDON: Well, again, I would say that what  
5 California decides to do is not what needs -- can be what  
6 determines under the -- the Federal statute. It's been  
7 argued by both sides and the case law is consistent that  
8 it's Federal rules of agency. And under Federal rules of  
9 agency, the salesperson is the agent of the corporation,  
10 not the individual broker.

11 If there are no further questions, I would just  
12 like to conclude and save the rest -- the remainder of my  
13 time for rebuttal.

14 QUESTION: Very well.

15 Mr. Schwemm.

16 ORAL ARGUMENT OF ROBERT G. SCHWEMM

17 ON BEHALF OF THE RESPONDENTS

18 MR. SCHWEMM: Justice Stevens, and may it please  
19 the Court:

20 I'd like to begin by addressing the  
21 veil-piercing and the preserving issue, particularly with  
22 respect to Justice Scalia's question because I disagree  
23 with my learned friend on the procedural posture of this  
24 case.

25 There was a 12(b)(6) motion to dismiss. In the

1 complaint at that time, there were essentially two  
2 theories. The complaint said that Mr. Meyer should be  
3 liable as an individual because he owned the corporation,  
4 and the complaint also said that Mr. Meyer should be  
5 liable because he was the officer/broker.

6 The district court granted in part, even with  
7 respect to the Fair Housing Act claim, the 12(b)(6) motion  
8 and, in particular, held that the allegations of the  
9 complaint with respect to ownership under no circumstances  
10 could lead to liability. And the only thing that the  
11 district court did not grant 12(b)(6) on was the issue  
12 with respect to liability based on officer/broker.

13 That led to discovery. The district court then  
14 granted summary judgment because it was the district  
15 court's theory on that issue that there could not be  
16 liability unless Mr. Meyer held an individual broker's  
17 license as opposed to what he holds in this case, which is  
18 a license through Triad, or more properly, according to  
19 the California law, Triad holds the license through him.

20 So with all respect, what the district court  
21 held in the 12(b)(6) motion was that no set of facts that  
22 the plaintiffs could prove could justify veil-piercing.  
23 We never got --

24 QUESTION: Well, could prove or -- or claimed  
25 they could prove in response to the motion. I mean,

1 you -- you don't have to sit back and say, I wonder what  
2 they might be able to prove. You -- you have to have made  
3 an offer of proof, and -- and what the court held was that  
4 none of the facts that you claimed you could prove would  
5 suffice. Isn't that an accurate description of -- of  
6 what -- what the holding of the court was?

7 MR. SCHWEMM: And the facts that we alleged were  
8 that Mr. Meyer was the sole owner of the corporation,  
9 which they denied, and that that was sufficient to impose  
10 individual liability. And when the district court granted  
11 12(b)(6) motion, my understanding of that is that he is  
12 saying, under no set of facts will you ever win.

13 Now, what would --

14 QUESTION: -- isn't that true that -- that you  
15 have to have something more than simply a person being a  
16 sole owner of a corporation? Otherwise a person couldn't  
17 create a corporation with himself as a 100 percent owner.

18 MR. SCHWEMM: Absolutely.

19 QUESTION: All right. So they're -- what  
20 they're saying is you didn't allege anything than that,  
21 and you certainly didn't support anything other than that  
22 with affidavits or other -- or other offers of proof.

23 MR. SCHWEMM: That's -- that was my point --

24 QUESTION: Yes.

25 MR. SCHWEMM: -- with respect to the summary

1 judgment.

2 QUESTION: All right. Well, if you -- if you  
3 didn't, then you're out of luck, aren't you?

4 MR. SCHWEMM: I don't think so because --

5 QUESTION: Because?

6 MR. SCHWEMM: -- at the 12(b)(6) motion stage,  
7 we are told that you can't even --

8 QUESTION: No, no. I'm not saying 12(b)(6).  
9 I mean on summary judgment.

10 MR. SCHWEMM: Yes. If my learned friend was  
11 right that this was a summary judgment dismissal of that  
12 claim, I might agree. But that's not right.

13 We were stopped at the very pleadings stage. We  
14 were prepared to show both of the key factors with respect  
15 to veil-piercing, which is that the corporation is heavily  
16 underfunded. In fact, in a colloquy with the district  
17 court, the defendant's counsel, after the 12(b)(6) motion,  
18 Your Honor, when the only thing left was the summary  
19 judgment with respect to the broker situation, the  
20 district court said, is there any money in the company?  
21 And the defendant's lawyer said, no, there is not.

22 QUESTION: Okay. I have your complaint here on  
23 page 16 and 17 of the joint appendix. First claim, Fair  
24 Housing Act. I don't see anything there about -- about  
25 veil-piercing or anything like that. Where -- where is it

1 in the complaint?

2 MR. SCHWEMM: Correct, Your Honor. The -- the  
3 phrase veil-piercing is not mentioned --

4 QUESTION: No, no. Or anything even vaguely  
5 like that. I mean, what it seems to say is that Mr. Meyer  
6 himself did all these things, or through his agent. Now,  
7 that's -- that's what it says.

8 MR. SCHWEMM: The allegation, if I could refer  
9 Your Honor to page 4 of the joint appendix in paragraph 6  
10 of the complaint, says that he owned the corporation and  
11 on that basis he's individually liable. And then it goes  
12 on and says he also was the officer/broker of the  
13 corporation, which is the other theory --

14 QUESTION: Yes, I see where it says he owned the  
15 corporation. What I don't see is something that says, and  
16 therefore he is liable because he owned it. I mean, it  
17 just seems to be the part where you're describing the  
18 parties.

19 MR. SCHWEMM: There is another part, Your Honor.  
20 Page 7 of the joint appendix, paragraph 13, which carries  
21 over to page 8. Essentially the same thing. I'm not  
22 suggesting that there is additional material there, but  
23 there is the allegation of ownership leading to personal  
24 liability.

25 QUESTION: No. I mean -- to be honest with you,

1 I'm not -- I'm just debating with myself whether you -- we  
2 should send this back to the Ninth Circuit, tell them work  
3 this out or not. And district court judges are not  
4 mind-readers. They -- they can't make up what you're  
5 saying in a complaint unless you say it and unless you  
6 argue it. So -- so that's why I'm pressing you on this.  
7 I'm -- I'm trying to find the particular point where you  
8 really made this point to the district court so the judge  
9 would focus on it and make a decision.

10 MR. SCHWEMM: Well, I wish it was more detailed,  
11 Your Honor, but it seems to me it's sufficient for notice  
12 pleading. The district court understood it. The  
13 defendants understood it.

14 QUESTION: Well, he didn't seem to, in his  
15 opinion, understand it because the only reference he has  
16 to veil-piercing seems in a footnote in a paragraph. And  
17 what he seems to be saying there is referring to a  
18 different argument, the argument that there could be no  
19 veil-piercing because he didn't even own this corporation.  
20 And he says, that -- that's really wrong. It's not true.  
21 Or maybe he said it was right, but he was wrong if he said  
22 it was right.

23 MR. SCHWEMM: And that's at the 12(b)(6) stage.  
24 And -- and my understanding of that is he is saying, I'm  
25 not going to get you -- let you go forward to your proof

1 because under no circumstances can there be veil-piercing  
2 under the Fair Housing Act, which is just wrong.

3 QUESTION: This was at the summary judgment  
4 stage?

5 MR. SCHWEMM: No, sir. On page 32, which is the  
6 district court's order, page 32 to the joint appendix,  
7 which is the district court's order --

8 QUESTION: 32 of the joint appendix.

9 MR. SCHWEMM: Yes, Your Honor. It actually  
10 starts as an opinion on page 25 of the joint appendix.  
11 This is the district court's order granting in part the  
12 12(b)(6) motion. He doesn't allow going forward at the  
13 12(b)(6) stage the claim based on ownership. He allows  
14 going forward the claim based on corporate broker, and he  
15 specifically refers to a case -- this is the 12(b)(6)  
16 decision -- that talks about veil-piercing. Page 32 of  
17 the joint appendix in the footnote.

18 Now, our point is that that's enough for notice  
19 pleading. The defendants understood what was going on.  
20 The judge understood what was going on. We were  
21 prepared -- certainly at the summary judgment stage,  
22 Justice Scalia, we would -- we would have been happy to go  
23 forward with proof of underfunding, and there is  
24 substantial proof of underfunding. We would have been  
25 happy to go forward with proof of lack of corporate



1 formalities. This is a company --

2 QUESTION: Well, had you alleged any of these  
3 things? I mean, opposing counsel referred in his argument  
4 to an allegation that the individual taxpayer ID number  
5 was being used. Did you allege that in -- in the  
6 complaint somewhere?

7 MR. SCHWEMM: That we did allege.

8 QUESTION: Okay. Where is it? I mean, this is  
9 what we're fishing for. Did you allege anything beyond  
10 the mere claim of sole ownership?

11 MR. SCHWEMM: Page 7 of the joint appendix, Your  
12 Honor, paragraph 13 toward the bottom of the page. After  
13 it's been alleged that Triad was owned by Mr. Meyer --

14 QUESTION: Yes. I got it.

15 MR. SCHWEMM: Got it?

16 QUESTION: Yes.

17 Did you allege anything -- I mean, okay, we've  
18 got sole ownership. We've got taxpayer ID. Did you  
19 allege anything else that might be a basis for piercing  
20 the veil?

21 MR. SCHWEMM: We -- we did not allege the  
22 details of that. That is to say, we did not allege  
23 underfunding, and we did not allege lack of corporate  
24 formalities. But it seems to me that's not required under  
25 Conley versus Gibson. There is notice pleading, and then

1 we are put to our proof if that had been permitted to go  
2 forward to the summary judgment stage.

3 QUESTION: You're -- the point you're making is  
4 that you are not certainly required under the Federal  
5 rules to set out your -- any theory of the pleadings. You  
6 just have to state facts showing that there's a claim for  
7 relief.

8 MR. SCHWEMM: That's exactly right, Your Honor.  
9 And it seems to me in a case decided by this Court in the  
10 mid-'90s -- I believe it was Peacock -- the Court said  
11 veil-piercing is really not a new claim. It is a theory  
12 of relief. We have claimed Fair Housing Act liability in  
13 the complaint based on these --

14 QUESTION: Mr. Schwemm, can I ask you this  
15 question? We really didn't grant certiorari to decide --

16 MR. SCHWEMM: Yes.

17 QUESTION: -- a California question as esoteric  
18 as this one is. And I'm just wondering, do you defend the  
19 rationale of the Ninth Circuit and do you defend the -- do  
20 you abandon reliance on any Federal defense here?

21 MR. SCHWEMM: Our position --

22 QUESTION: Or Federal regulation.

23 MR. SCHWEMM: -- is that the Ninth Circuit's  
24 judgment was correct, but it went too far when it reached  
25 out and said under the Fair Housing Act we have to go

1 beyond traditional principles of agency. We think the  
2 standard should be, just as it is under Title VII, the  
3 employment discrimination law, in *Kolstad*, *Burlington*  
4 *Industries*, and *Faragher*, that the standard for vicarious  
5 liability under the Federal statute should be a Federal  
6 standard. And that standard should be traditional agency  
7 principles as informed by the policies of the Fair Housing  
8 Act.

9           Now, the Ninth Circuit apparently felt that they  
10 had to go beyond traditional agency principles. What  
11 we've tried to do in the brief in Roman numerals I, II,  
12 and III is point out three separate and independent  
13 alternative theories under traditional agency principles.  
14 And in that sense, we -- we think the Ninth Circuit just  
15 reached out and tried to do something that wasn't  
16 necessary.

17           QUESTION: Well, then is your piercing-of-  
18 corporate-veil theory a Federal theory or a State law  
19 theory?

20           MR. SCHWEMM: Our position on that is that it's  
21 probably Federal law, but as I read *Bestfoods*, the Court  
22 hasn't specifically determined, and if I may say that  
23 this -- this is something that I don't have a position on.  
24 But either way, we are entitled to a remand whether it's  
25 Federal or California law. But the cause of action

1 clearly is the Fair Housing Act.

2 I believe the Government takes the position --  
3 and we certainly don't disagree with the Government --  
4 that it is a Federal question.

5 And if I may, I want to get into those parts I,  
6 II, and III of our brief, and particularly the first part  
7 and vicarious liability.

8 The problem we have with petitioner's argument  
9 is that I believe it's based on two faulty assumptions.  
10 One is that petitioner wants to take certain parts of the  
11 California corporation and real estate law that are  
12 advantageous to him, but he doesn't want to take the other  
13 part, which is the responsibility part. It is literally  
14 true that in California, a corporation can be a broker,  
15 but it cannot be a broker unless there is an individual  
16 appointed who is an officer of the corporation and has  
17 qualified under the broker requirements, and that  
18 individual is required by California law to take  
19 responsibility for the supervision and control of the  
20 agency.

21 QUESTION: Yes, but your opponent says that  
22 the -- the results under California law is he can be  
23 disciplined if he fails to do so, but there are no  
24 California cases holding him personally liable if he fails  
25 to do so.

1           MR. SCHWEMM: Our position is that that may be  
2 right, it may be wrong. We believe this is a Federal  
3 standard.

4           QUESTION: Do you think it's right or wrong?

5           MR. SCHWEMM: If we got a remand, Your Honor, we  
6 would very much like the opportunity on this basis to  
7 argue that it's wrong. There is a California case in 1978  
8 that holds that, but a year later, California amends its  
9 licensing statute to add the very key provision in this  
10 case which is 10159.2 which says that the individual who's  
11 appointed by the corporation as the officer/broker has  
12 personal responsibility. So our argument would be on  
13 remand that that change.

14           But I want to -- I want to make the point  
15 that --

16           QUESTION: Well, can -- can I go back to an  
17 earlier point you made. You said that California law says  
18 that the corporate broker, the -- the one who's designated  
19 for the corporation, has to exercise control over the --  
20 over the brokers in the corporation. That may well be  
21 true.

22           The -- the issue is not whether he -- he has to  
23 exercise control. It's whether he exercises control in  
24 his personal status or rather exercises control as an  
25 officer of the corporation. If it's in the latter

1 capacity that he exercises control, he -- he should not  
2 have personal liability. It's the corporation that has  
3 liability.

4 MR. SCHWEMM: Well --

5 QUESTION: Now, as I understand the California  
6 law, this broker could not operate under that license on  
7 his own. The only way he could use that license was as an  
8 officer of the corporation. Isn't that correct?

9 MR. SCHWEMM: I would put it actually a little  
10 differently. If you divide the corporation from  
11 Mr. Meyer, Mr. Meyer can then apply, because he's  
12 qualified, to become a broker. Currently he would have to  
13 file a paper, but he would clearly get the status. But  
14 Triad, Inc. would cease at that moment being able to be a  
15 broker. And none of the acts in this case, none of the  
16 salesman's acts, could have been performed under the  
17 rubric of Triad.

18 And the other point that I was going to make  
19 about the petitioner's argument that I think is faulty is  
20 it's the assumption that if Triad, Inc. is the principal  
21 of these agents, nobody else can be the principal of these  
22 agents. And that's clearly inconsistent with longstanding  
23 agency principles as reflected in the Restatement,  
24 section 20, comment f, which says there can be joint  
25 principals.

1           QUESTION: Well, yes, but -- sure, of course,  
2 there can. But -- but it's not -- it's corporation law  
3 that -- that the officers of the corporation are not one  
4 of those other principals.

5           MR. SCHWEMM: Ordinarily, Your Honor, but not in  
6 this case. I -- I repeat. This company cannot be a  
7 broker if it doesn't have a broker-qualified individual  
8 who takes responsibility for the agents. And so --

9           QUESTION: Do you think the Gipson case that you  
10 cited in your brief is on all fours with your case?

11          MR. SCHWEMM: No, Your Honor, it's not on all  
12 fours. I believe what it says is if the broker is  
13 operating as a sole proprietorship, as an individual, he  
14 clearly is vicariously liable. That is, by the way, what  
15 86 percent of the brokers in California do. They operate  
16 as sole proprietors, and they are clearly vicariously  
17 liable. There is a -- an additional question. What  
18 happens when you incorporate? And -- and so it's not  
19 exactly on all fours.

20          And I think the -- the jury is out or the judges  
21 are out with -- with respect to what California would do.  
22 Some States say in addition to the corporation, the  
23 individual is vicariously liable; some don't.

24          QUESTION: Well, so that means you can't have a  
25 corporation. If -- if you want to run a real estate

1 corporation, you can't do it because there has to be a  
2 broker's license, and you're going to be personally  
3 liable. What's the use of having a corporation then?

4 MR. SCHWEMM: There are many uses, Your Honor,  
5 and I would like to address that.

6 The only thing that we are arguing that  
7 Mr. Meyer was responsible for is what I would call the  
8 licensed activities. For example, if a broker went out on  
9 the way to a meeting and negligently drove his car and  
10 caused an accident, that is not the kind of behavior  
11 that's subject to broker supervision. And that would be  
12 no liability.

13 QUESTION: Well, but if he defrauds a client or,  
14 I mean, anything that's going to involve big money on the  
15 part of the corporation is going to come back on the head  
16 of the individual broker. So you're saying if you want to  
17 be in the brokerage business, you cannot do it as a  
18 practical matter in the corporate form.

19 MR. SCHWEMM: Only I'm not saying it, Your  
20 Honor.

21 QUESTION: That's -- well, no. That -- that's  
22 what you say the California law says.

23 MR. SCHWEMM: Yes. And every State -- I want to  
24 make this point. Every single State says this. 11 States  
25 say you can't even operate as a broker as a corporate



1 form. 39 States, including California, said we will allow  
2 you to do this, but there has to be one human being that  
3 is responsible.

4 And in this particular case, there came a point  
5 when Mr. Meyer was trying to get the Triad license  
6 extended. California said you haven't satisfied that  
7 because you personally, Meyer, haven't engaged in the  
8 continuing education requirements that an officer/broker  
9 is required --

10 QUESTION: That's even tougher than -- than what  
11 most States provide for lawyers.

12 MR. SCHWEMM: It's very analogous to lawyers,  
13 Your Honor.

14 QUESTION: No. It isn't analogous at all.  
15 Lawyers -- lawyers can -- can avoid personal liability.

16 QUESTION: California doesn't give personal  
17 liability there, does it? I mean, my statute here says  
18 there's an officer who's designated by a corporate broker  
19 license, and that officer is responsible for supervision  
20 and control of activities conducted on behalf of the  
21 corporation. So that suggests that he's conducting that  
22 supervision on behalf of the corporation, and so it's the  
23 corporation that would respond in -- in -- under the  
24 principle of respondeat superior.

25 MR. SCHWEMM: Let me --

1           QUESTION: Evidently that's what California has  
2 held, and given the wording, it seems reasonable.

3           MR. SCHWEMM: Well, it held that and then  
4 California's legislature came along and added -- added the  
5 requirements.

6           But let me -- let me make this observation:  
7 When Mr. Crank, the salesperson in this case, wanted to  
8 extend his salesperson's license, he was required to have  
9 his broker authorize the forms. This was done four times  
10 by Mr. Meyer. If you look at the form -- joint appendix  
11 lodging 75 is the most recent example, but there are three  
12 other examples -- the California form says, list the  
13 company. Triad. And then requires the officer/broker,  
14 Meyer in this case, to sign a certification which  
15 specifically says, I certify this salesperson is employed  
16 by me.

17           QUESTION: I only have 74 pages in my joint  
18 appendix. You said it was joint --

19           MR. SCHWEMM: I'm sorry. I -- I misspoke.  
20 Joint appendix lodging, Your Honor.

21           QUESTION: Oh.

22           MR. SCHWEMM: It's the large tan one.

23           QUESTION: Got you.

24           MR. SCHWEMM: And this was done, by the way, for  
25 Mr. Crank on four different occasions.

1           What I'm trying to -- to say is this is a  
2 classic case of joint principal. There aren't -- that  
3 isn't true, Justice Scalia, in -- in every corporate  
4 situation. Of course, not. We don't argue that. We  
5 argue that this is a responsible human being and that that  
6 makes him liable --

7           QUESTION: On the major question that we took  
8 the case to decide, what -- what's the general rule --  
9 well, we can ask the Government -- what the general rule  
10 for when we look to State law and when we look to Federal  
11 law. Certainly State law informs what the Federal law  
12 ought to be. That's -- that's Faragher and Burlington.

13           MR. SCHWEMM: That would be my response as well.  
14 We have a -- a Federal standard informed by State law.

15           QUESTION: Thank you, Mr. Schwemm.

16           MR. SCHWEMM: Thank you.

17           QUESTION: Mr. Stewart.

18           ORAL ARGUMENT OF MALCOLM L. STEWART

19           ON BEHALF OF THE UNITED STATES,

20           AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

21           MR. STEWART: Thank you, Justice Stevens, and  
22 may it please the Court:

23           As this case has been briefed in this Court,  
24 it's common ground among the parties and the United States  
25 that questions of vicarious liability under the Fair

1 Housing Act are to be decided on the basis of generally  
2 applicable principles of agency and corporate law rather  
3 than by reference to a rule that's distinct to the FHA.  
4 And obviously, it is a -- an important general principle  
5 of corporate law.

6 QUESTION: Well, do we look to general Federal  
7 common law agency principles, or are we bound by State  
8 agency law, Mr. Stewart?

9 MR. STEWART: I think the Court -- I'm sorry.  
10 I think the task for the Court would to -- be to devise a  
11 uniform nationwide rule. That's what the Court said --

12 But certainly the Court will look as -- as in  
13 Faragher and in Ellerth, the Court looked to the  
14 Restatement of Agency which for the most part is a  
15 compilation of decisions rendered by State courts. So  
16 it's -- it's looking to the law of the States generally,  
17 but it's not looking to the law of a particular State. So  
18 with respect to our veil-piercing argument, we would say  
19 that the Court should devise a uniform Federal --

20 QUESTION: Well, do you think it's fair to read  
21 the complaint that was filed as putting anyone on notice  
22 that it was a veil-piercing case?

23 MR. STEWART: We think that the claim was  
24 adequately raised in the district court.

25 QUESTION: Where?

1 MR. STEWART: The --

2 QUESTION: Could you read it to us?

3 MR. STEWART: The -- the plaintiffs --

4 QUESTION: Because it's not clear to me.

5 MR. STEWART: The plaintiffs --

6 QUESTION: I don't think if I read that  
7 complaint, I would read it as one that was proceeding on a  
8 veil-piercing theory.

9 MR. STEWART: Well, the --

10 QUESTION: I would have thought it was  
11 proceeding on the designated broker theory.

12 MR. STEWART: Well, the plaintiffs -- the  
13 plaintiffs didn't use the phrase, veil-piercing, but on  
14 page of the joint appendix, for instance, they alleged  
15 that Mr. Meyer is the designated officer/broker of Triad,  
16 the president of Triad. They also alleged that  
17 Mr. Meyer -- they alleged that Mr. Meyer was the sole  
18 shareholder of Triad. In addition, as Mr. Schwemm pointed  
19 out --

20 QUESTION: But that would be consistent with a  
21 corporation that's wholly adequately funded and -- and  
22 whose -- which -- whose veil cannot be pierced.

23 MR. STEWART: And it's true that they -- they  
24 didn't allege in the complaint inadequate capitalization.  
25 However, as Mr. Schwemm pointed out, there was a colloquy

1 in the district court in which the petitioner's counsel  
2 appeared to acknowledge that the corporation was without  
3 assets. And --

4 QUESTION: But it isn't -- I mean, look. The  
5 judge is sitting there on a motion to dismiss the  
6 complaint, and he reads the complaint. And when he reads  
7 the complaint, he looks to claims, and he sees first  
8 claim, Fair Housing Act, which doesn't have a word about  
9 this theory. And apparently in the brief, a different  
10 theory was produced, the one that's been produced today,  
11 that the reason they're liable is not because we want to  
12 pierce the veil, but because it's Mr. Meyer who's really  
13 the holder of the license in some sense, and that is  
14 sufficient.

15 So not surprisingly, the district court says  
16 that. He says any liability against Meyer as an officer  
17 of Triad would attach only to Triad in that plaintiffs  
18 have not urged theories that could justify reaching Meyer  
19 individually, with one exception. And he then goes and  
20 discusses the exception. Well, if I were a district  
21 judge, I would have thought I had done my job at that  
22 point unless somebody came in and petitioned for rehearing  
23 and said, judge, you missed something, which no one did.

24 MR. STEWART: I think you're right that the  
25 primary theory that the respondents advocated in the

1 district court was based on Mr. Meyer's --

2 QUESTION: No. Sole. Let's try sole theory.

3 MR. STEWART: Well, this -- this was raised and  
4 disputed in the Ninth Circuit; that is --

5 QUESTION: In the footnote.

6 MR. STEWART: Not just in the footnote. In the  
7 Ninth Circuit at page 7 and 8 of the petition appendix,  
8 the Ninth Circuit having turned to the possible liability  
9 of Mr. Meyer as the shareholder of Triad. And the Ninth  
10 Circuit said petitioner Meyer disputes that he was sued in  
11 that capacity. However, the Ninth Circuit goes on to  
12 hold, we disagree. We think that claim was adequately  
13 raised in the district court.

14 QUESTION: Of -- of course, what was raised is  
15 we get Meyer because Meyer holds the license, and even  
16 though it's held in the name of the corporation, that  
17 really doesn't matter.

18 MR. STEWART: No. But the Ninth Circuit clearly  
19 understood the claim against Meyer as shareholder to be  
20 distinct from or at least in addition to the claim against  
21 Meyer as designated officer/broker.

22 That is, what -- what seems to us to make this a  
23 paradigmatic case for veil-piercing, taking the facts --

24 QUESTION: Well, maybe it is.

25 MR. STEWART: -- in the light most favorable to

1 the respondent, is the combination of functions that  
2 Mr. Meyer played.

3 Now, it's true that the respondent by and large  
4 and the Ninth Circuit appeared to regard these distinct  
5 functions as separate and independent bases for liability.  
6 But in our view, it's only a short step to say even if no  
7 one of the roles that Mr. Meyer played would be an  
8 independently sufficient ground for imposing personal  
9 liability, the combination of functions, together with the  
10 inadequate -- apparent inadequate capitalization --

11 QUESTION: Mr. Stewart, as -- as I understand  
12 the theory of why the failure to bring forward affidavits  
13 or some -- some evidentiary proof of these matters at the  
14 summary judgment stage was not necessary, as I understand  
15 it, the plaintiffs' theory is it wasn't necessary because  
16 the piercing-the-veil portion of the complaint never made  
17 it to the summary judgment stage. It had been dismissed  
18 on the face of the complaint. Is that correct?

19 MR. STEWART: That is correct.

20 QUESTION: Now, was there an appeal of that  
21 dismissal on the face of the complaint?

22 MR. STEWART: The -- the ultimate -- there was  
23 not a separate appeal, but the ultimate appeal that went  
24 to the Ninth Circuit was an appeal both from the dismissal  
25 of certain portions of the complaint and from the grant of



1 summary judgment with respect to --

2 QUESTION: What portion? Was -- it was an  
3 appeal of the -- of the portion of the complaint that  
4 dismissed -- dismissed a -- a veil-piercing --

5 MR. STEWART: It was not specific. The -- the  
6 appeal from the dismissal was with regard to Mr. Meyer's  
7 potential liability as shareholder and the appeal from the  
8 grant of summary judgment with regard to his potential  
9 liability as designated officer/broker was based on the  
10 grant of summary judgment.

11 QUESTION: Well, so in addition to the complaint  
12 being very vague, the -- the appeal of the dismissal was  
13 pretty vague too. I -- I don't understand what -- I mean,  
14 if you were objecting to the dismissal of the -- of -- of  
15 a veil-piercing theory, you -- you should have, it seems  
16 to me, come forward and say, I object to dismissal of that  
17 theory.

18 MR. STEWART: I would acknowledge that the  
19 theory that -- that we and the respondents have -- the  
20 veil-piercing theory that we have advanced in this Court  
21 is a refinement of what was said in the Ninth Circuit.  
22 But it's -- it's always been part of the case that  
23 Mr. Meyer's liability was alleged on the basis of his  
24 status as shareholder, his status as designated  
25 officer/broker, his status as president. And again, the

1 claim in the Ninth Circuit tended -- tended to be more  
2 that these were independent bases for liability. And our  
3 view is that no one of them would be sufficient in and of  
4 itself. Taken together, they establish that Mr. Meyer  
5 exercised pervasive control over --

6 QUESTION: Mr. Stewart, I'm -- I'm confused  
7 about one procedural point. Was there not a final  
8 judgment in the district court --

9 MR. STEWART: There -- there --

10 QUESTION: -- at the end of the rope, one final  
11 judgment that says that defendant wins and then you --  
12 from that final judgment you can take up all the rulings  
13 against the verdict -- the -- the judgment loser?

14 MR. STEWART: That -- that's correct. The  
15 district judge first threw out on 12(b)(6) everything  
16 except the claim against Mr. Meyer as designated  
17 officer/broker, and subsequently entered summary judgment  
18 for the petitioner on that claim. And then there was a  
19 final judgment and that was taken up to the Ninth Circuit.

20 QUESTION: And the final judgment would include  
21 all the rulings on the way to that final judgment  
22 disposing of the entire case.

23 MR. STEWART: That -- that's correct.

24 Now, in the course of doing discovery on the  
25 designated officer/broker question, they -- the plaintiffs

1 unearthed some facts that are potentially relevant to the  
2 veil-piercing theory, but they've had no discovery on  
3 veil-piercing as such.

4           And another important criterion in determining  
5 whether veil-piercing is appropriate is whether the  
6 individual bears some degree of personal fault for the  
7 wrong alleged. And here, the plaintiffs' allegation is  
8 that Mr. Meyer negligently supervised Mr. Crank, that that  
9 was a contributing factor in Crank's ultimate misconduct,  
10 and that would suffice to show that aspect of the  
11 veil-piercing analysis.

12           I think it's also important to note that courts  
13 are typically more willing to pierce the veil in tort  
14 cases than in contract cases; that this Court has  
15 described the Fair Housing Act as -- as essentially  
16 defining a new type of tort. The theory is that in  
17 contract cases, an individual who contracts with a  
18 corporation has his own opportunity to assess the -- the  
19 corporation's finances and decline to do business if the  
20 corporation seems likely not to be able to satisfy its  
21 obligations whereas in a tort case the -- the potential  
22 plaintiff has no opportunity to do that.

23           Inadequate capitalization has always been an  
24 important factor in veil-piercing analysis, and really it  
25 goes to the question whether the incorporators have

1 adequately respected the independent status of the  
2 corporate entity.

3 QUESTION: You don't -- you don't rely in your  
4 submission on the proposition that under California law,  
5 the broker is liable.

6 MR. STEWART: We -- we don't. That --

7 QUESTION: And is that because you accept the  
8 distinction between a corporate broker -- a broker's  
9 license which is in the corporation?

10 MR. STEWART: I think it's partly that. I think  
11 it's partly just the general background rule is individual  
12 supervisors are ordinarily not vicariously liable for  
13 torts committed by the people they supervise.

14 QUESTION: Suppose in a majority of the States,  
15 the broker is liable for the -- I forget the --  
16 intervening corporate -- suppose in a majority of the  
17 States, the broker is liable for the acts of the  
18 salesperson.

19 MR. STEWART: May I answer?

20 QUESTION: Yes.

21 MR. STEWART: If a consensus developed among the  
22 States that designated officers/brokers were sufficiently  
23 different from ordinary supervisors that they should be  
24 held vicariously liable, then we would advocate that as  
25 the general Federal rule. But the respondent has not

1 established that there is such a consensus.

2 QUESTION: Thank you, Mr. Stewart.

3 Mr. Benedon, you have 7 minutes left.

4 REBUTTAL ARGUMENT OF DOUGLAS G. BENEDON

5 ON BEHALF OF THE PETITIONER

6 MR. BENEDON: Your Honors, I would submit at  
7 this point unless there are any further questions.

8 QUESTION: Thank you.

9 QUESTION: I --

10 QUESTION: Oh, excuse me.

11 QUESTION: I do have -- I'm still -- what is --  
12 what is your response to the -- to the assertion that it  
13 was not necessary for the plaintiffs to bring forward any  
14 affidavits or evidence at the summary judgment stage  
15 because on the -- on the veil-piercing`issue -- because  
16 that issue was no longer alive at the -- at the summary  
17 judgment stage. It had been dismissed on the complaint.

18 MR. BENEDON: I would start from the premise  
19 that the veil-piercing theory was never born, not that it  
20 wasn't alive. Okay?

21 QUESTION: In other words, you -- you concede  
22 that then and -- and you -- you fall back on -- on the  
23 simple fact that the veil-piercing theory was never -- was  
24 never really contained in the complaint.

25 MR. BENEDON: Never contained in the complaint,

1 never raised --

2 QUESTION: But it is actually. I mean, it says  
3 that -- that the -- the defendant violated the Fair  
4 Housing Act when his agent discriminated. That's what it  
5 says in paragraph 41.

6 And then previously in paragraph 13, it lists a  
7 whole lot of facts about the relationship of Mr. Meyer to  
8 the company including the fact about the tax numbers and  
9 so forth.

10 And so what they say is, you know, the complaint  
11 doesn't have to spell out every theory, but it does state  
12 some facts there from which this basis could be fairly  
13 inferred, and therefore it shouldn't have been dismissed.  
14 Rather, they should have had at least an opportunity to  
15 argue it. I -- I take it something like that is their  
16 claim.

17 MR. BENEDON: But again, we have to look at what  
18 are the allegations in the complaint.

19 QUESTION: Well, the allegations are just what I  
20 had said, paragraph --

21 MR. BENEDON: There --

22 QUESTION: Yes.

23 MR. BENEDON: There are allegations of sole  
24 ownership, corporate -- that he was the sole owner, that  
25 he was the officer/broker, and that he was the president,

1 and that the taxes were paid under his ID number, an  
2 allegation that's never been proven.

3 I think most telling to what was the issue in  
4 this case is the holding of the Ninth Circuit itself, and  
5 that's at page 67 of the joint appendix where the court of  
6 appeals states where common ownership and management  
7 exists, corporate formalities must not be rigidly adhered  
8 to, a holding which is clearly erroneous, but which sets  
9 out what was the issue in this case. The issue was not  
10 under-capitalization. The issue was not mismanagement of  
11 corporate formalities. The issue is -- was could  
12 Mr. Meyer as an individual be held liable because he was  
13 the sole owner, president, and designated broker of  
14 Triad -- Triad Realty. Excuse me.

15 And for that reason, the Ninth Circuit should be  
16 reversed and the judgment of the district court in favor  
17 of Mr. Meyer reinstated in full.

18 JUSTICE STEVENS: Thank you, Mr. Benedon.

19 The case is submitted.

20 (Whereupon, at 11:01 a.m., the case in the  
21 above-entitled matter was submitted.)

22

23

24

25