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UNITED STATES DISTRICT COURT  
Northern District of California

STEVE THIEME,

No. C 13-03827 MEJ

Plaintiff,

**ORDER RE DEFENDANT'S MOTION  
TO DISMISS** [Dkt. No. 6]

v.

DIANE M COBB, *et al.*,

Defendants.

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**I. INTRODUCTION**

On July 16, 2013, Plaintiff Steve Thieme filed this lawsuit in Marin County Superior Court, asserting state claims against Defendants Diane Cobb dba DM Finance or DM Financial, Sloan Davis dba DM Finance or DM Financial, and VanDyk Mortgage Corporation, stemming from his loss of \$150,000 he invested in Cobb and Davis's bridge mortgage business, which Cobb allegedly undertook while an employee of VanDyk. Not. of Rem., Dkt. No. 1, Ex. A (Complaint).

On August 16, 2013, VanDyk removed the action to this Court based on diversity jurisdiction pursuant to 28 U.S.C. § 1332, 1441(a), and 1446. Dkt. No. 1. Pending before the Court is VanDyk's Motion to Dismiss Plaintiff's Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 6. Plaintiff has filed an Opposition (Dkt. No. 15), and VanDyk has filed a Reply (Dkt. No. 31). On October 31, 2013, the Court held oral argument on the Motion. After carefully considering the parties' briefs, controlling authorities, and oral argument, the Court **GRANTS** VanDyk's Motion and **DISMISSES** Plaintiff's Complaint **WITH LEAVE TO AMEND**.

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2 **II. BACKGROUND**

3 Plaintiff lives in Baton Rouge, Louisiana. Compl. ¶ 1. VanDyk is a Michigan Corporation  
4 that provides mortgage services, with offices in Northern California, as well as in Las Vegas, Nevada.  
5 Compl ¶¶ 4, 5. Defendant Cobb was employed by VanDyk from October 2007, through December  
6 31, 2012. *Id.* ¶ 14. From October 2007, to August 2011, Cobb was the branch manager at VanDyk’s  
7 Mill Valley and Larkspur offices. *Id.* ¶ 5. Subsequently, from August 2011, until December 31,  
8 2012, Cobb was the branch manager at VanDyk’s Las Vegas office. *Id.*

9 According to Plaintiff, Cobb and Davis formed an informal partnership or association called  
10 DM Financial in March 1990. *Id.* ¶ 7(a). The purpose of DM Financial was to arrange bridge  
11 mortgages for persons relocating, often from one state to another. *Id.* The bridge mortgages would  
12 facilitate the relocation. *Id.* The funding for these bridge mortgages was provided by investors such  
13 as Plaintiff, who alleges that his investments into DM Financial were wrongfully and/or unlawfully  
14 converted during the time Cobb was an employee of VanDyk. *Id.* ¶ 15. Specifically, Plaintiff alleges  
15 that “[d]uring the approximate period of February 9, 2011 to December 31, 2012, [Plaintiff]  
16 forwarded no less than \$150,000 to Cobb and Davis in order to participate in no less than six bridge  
17 loans under the aegis and auspices of Defendants Cobb, Davis and Does 1-50, for the applicable  
18 investments to be made on Plaintiff Thieme’s behalf.” *Id.* ¶ 7(g). Plaintiff alleges that Cobb’s  
19 actions “were at all times committed . . . incident to her duties as a branch manager of VanDyk  
20 Mortgage Corporation, whether in Mill Valley, California, Larkspur, California, and/or Las Vegas,  
21 [Nevada].” *Id.* ¶ 7(k). Particularly, “[a]s part of her duties, Cobb was required to locate prospective  
22 borrowers, and leads to such prospective or potential borrowers, who could then be contacted or  
23 solicited in the context of first mortgage borrowing from VanDyk Mortgage Corporation by Cobb  
24 and [her] associates.” *Id.*

25 Plaintiff alleges that in furtherance of their scheme to defraud, Cobb and Davis were forging  
26 promissory notes and deeds of trust, which were sent to the investors as evidence that the loans had in  
27 fact been made. *Id.* ¶ 9. However, beginning in April 2012, payments from Cobb and Davis to  
28 Plaintiff became sporadic and then stopped. *Id.* Plaintiff alleges that by July 2012, Cobb and David



1 initially and continuously investigate and monitor Cobb’s activities in her role as branch manager and  
2 externally to ensure that she was not engaged in business that conflicted with VanDyk’s mortgage  
3 lending business or violated federal regulations and VanDyk’s internal policies prohibiting outside  
4 lending activities. Opp. at 7-8. He asserts that VanDyk’s failure to take such actions resulted in his  
5 loss of \$150,000. *Id.*

6 Generally, to succeed on a negligence claim in California, a plaintiff must prove the following  
7 elements: “(1) defendant’s obligation to conform to a certain standard of conduct for the protection of  
8 others against unreasonable risks (duty); (2) failure to conform to that standard (breach of the duty);  
9 (3) a reasonably close connection between the defendant’s conduct and resulting injuries (proximate  
10 cause); and (4) actual loss (damages).” *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009)  
11 (quoting *McGarry v. Sax*, 158 Cal. App. 4th 983, 994 (Cal. Ct. App. 2008)). In the employment  
12 context, an employer may be held directly liable for the behavior of an unfit employee where the  
13 employer was negligent in the hiring, training, supervising, or retaining of that employee. *Delfino v.*  
14 *Agilent Tech., Inc.*, 145 Cal. App. 4th 790, 815 (2006). “Negligence is a core element of this claim –  
15 the plaintiff must demonstrate that the employer ‘knew or should have known that hiring the  
16 employee created a particular risk or hazard and that particular harm materializes.’” *Keum v. Virgin*  
17 *Am. Inc.*, 781 F. Supp. 2d 944, 951 (quoting *Delfino*, 145 Cal. App. 4th at 815). The requirement that  
18 an employer have knowledge of the employee’s potential danger goes to the foreseeability  
19 requirement discussed in the first prong of the *Rowland* test. *Id.* (citing Rest. 3d Agen. § 7.05,  
20 comment d.)

21 1. Duty

22 VanDyk first challenges Plaintiff’s negligence claim on the ground that he has not alleged  
23 facts establishing a connection between Plaintiff and VanDyk which would give rise to a legal duty of  
24 care. Mot. at 5. Plaintiff, however, maintains that Cobb’s activity of promoting second mortgages  
25 through DM Financial “was a closely related and inherent outgrowth” of VanDyk’s mortgage lending  
26 business, thereby creating a duty of care on the part of VanDyk to Plaintiff and other investors in  
27 Cobb’s scheme. Opp. at 6-7. The Court, however, agrees with VanDyk.

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1           “The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to  
2 establishing a claim for negligence.” *Nymark v. Heart Fed. Sav. & Loan Ass’n.*, 231 Cal. App. 3d  
3 1089, 1095 (1991). “[A]bsent a duty, the defendant’s care, or lack of care, is irrelevant.” *Software*  
4 *Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal. App. 4th 472, 481 (1996). “The  
5 existence of a legal duty to use reasonable care in a particular factual situation is a question of law for  
6 the court to decide.” *Vasquez v. Residential Inv., Inc.*, 118 Cal. App. 4th 269, 278 (2004) (citation  
7 omitted).

8           California courts apply the seven-factor *Rowland* test to determine whether a duty exists that  
9 would support a finding of negligence. *Rowland v. Christian*, 69 Cal.2d 108, 113 (1968) (overruled  
10 in other part). Specifically, courts examine the following factors to determine whether a duty exists:  
11 “(1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered  
12 injury, (3) the closeness of the connection between the defendant’s conduct and the injury suffered,  
13 (4) the moral blame attached to the defendant’s conduct, (5) the policy of preventing future harm, (6)  
14 the extent of the burden to the defendant and consequences to the community of imposing a duty to  
15 exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of  
16 insurance for the risk involved.” *Id.* Once the defendant’s duty has been established, the plaintiff  
17 must show that defendant breached that duty and thereby proximately caused her injury. *See Keum v.*  
18 *Virgin Am.*, 781 F. Supp. 2d 944, 951 (N.D. Cal. 2011).

19                           *a. Foreseeability*

20           Here, as VanDyk correctly points out, Plaintiff has not alleged that he was a customer or had  
21 any direct business dealings with VanDyk. Reply at 5. Rather, Plaintiff dealt directly with Cobb in  
22 her business as DM Financial. There are no allegations that VanDyk knew of Plaintiff, his  
23 interaction with Cobb or DM Financial, or his decisions to repeatedly invest his money with Cobb  
24 and DM Financial. Moreover, although Plaintiff alleges that VanDyk had a duty to investigate Cobb  
25 and continue to monitor her activities, Plaintiff has set forth no allegations that Cobb had previously  
26 been involved in impermissible activity such that VanDyk would have been on notice that Cobb  
27 presented such a risk to its customers. At most, Plaintiff has alleged that Cobb’s name an email  
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1 address using DM Financial were discoverable on the internet and that Cobb used VanDyk's  
2 computers and answered the phone as VanDyk. Compl. ¶ 64. However, these facts do not  
3 demonstrate that Cobb was engaged in any business that presented a conflict or potential risk to  
4 Plaintiff. Indeed, according to Plaintiff's allegations, it wasn't until 2012 when Plaintiff failed to  
5 receive return on the money he invested with Cobb and Davis, that he became aware of their scheme.  
6 *Id.* ¶¶ 8-9. The Court thus finds that Plaintiff has failed to demonstrate Cobb's purported unlawful  
7 conduct was foreseeable to VanDyk.

8 *b. Degree of Certainty that the Plaintiff Suffered Injury*

9 As to this factor, Plaintiff has clearly alleged that he invested \$150,000 with Cobb and Davis,  
10 which Cobb and Davis failed to account for.

11 *c. Closeness of the Connection Between Defendant's Conduct and Plaintiff's*  
12 *Injury*

13 Plaintiff alleges that had VanDyk investigated and monitored Cobb's activities with DM  
14 Financial, it would have prevented his injuries. *Id.* ¶¶ 59-61, 67. However, Plaintiff acknowledges in  
15 his Complaint that Cobb was acting outside the scope of her employment and in violation of  
16 VanDyk's internal operating rules. *Id.* ¶¶ 56, 58, 62, 63, 65. Plaintiff has not set forth any  
17 allegations indicating that Cobb's act of operating a business engaged in arranging bridge financing  
18 was part of her job duties at VanDyk; that VanDyk directed her to engage in that business; or that  
19 VanDyk profited from Plaintiff's investment. Plaintiff's investments were with Cobb and DM  
20 Financial, not VanDyk. In particular, Plaintiff has not alleged that he obtained a mortgage from  
21 VanDyk or had any kind of business relationship with VanDyk at any point. His dealings were with  
22 Cobb, individually, and exclusively dealt with investing in DM Financial's bridge lending operation.  
23 Nor does the fact that VanDyk supplied Cobb with an office and computer to carry out her duties as a  
24 VanDyk employee demonstrate any connection between VanDyk and Plaintiff's decision to invest his  
25 money with DM Financial. *See Delfino*, 145 Cal. App. 4th at 816 (finding no connection between  
26 plaintiffs' injuries and the fact that the defendant-employer supplied the offending-employee a  
27 computer which the employee used to send threatening messages to the plaintiffs).

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1                   g.       *The Availability, Cost, and Prevalence of Insurance for the Risk Involved*  
2       Because neither party provides any argument on this factor, the Court declines to address it.

3       2.       Summary

4       Taking the foregoing factors into consideration, the Court finds that Plaintiff has failed to set  
5 forth allegations demonstrating that VanDyk owed a duty of care to Plaintiff. There are no facts  
6 indicating that Plaintiff's injury was foreseeable, that it was connected to the operation of VanDyk's  
7 business, or suggesting that VanDyk is morally culpable for Plaintiff's loss. Finding that a duty  
8 exists in this scenario would force VanDyk to guard against any conduct by its employees involving  
9 any person; rather than conduct that is related to the employee's duties. Because Plaintiff has not set  
10 forth allegations to support the duty element of his negligence claim, the Court finds it is subject to  
11 dismissal. The Court therefore **GRANTS** VanDyk's Motion with respect to Plaintiff's claim for  
12 professional negligence. However, because it may be possible for Plaintiff to allege additional facts  
13 supporting the elements discussed above, the Court **GRANTS** Plaintiff leave to amend.

14 **B.       Plaintiff's Eighth Cause of Action for Respondeat Superior**

15       Plaintiff's Eighth Cause of Action is for respondeat superior. Compl. ¶¶ 77-88. Plaintiff  
16 alleges that as VanDyk's employee and a branch manager, VanDyk is liable for Cobb's conduct  
17 which lead to his loss of \$150,000. VanDyk moves to dismiss this claim on the ground that  
18 California does not recognize a cause of action for respondeat superior; rather, it is merely a theory of  
19 liability. Mot. at 10. The Court agrees with VanDyk. *See Fidelity Nat'l Title Ins. Co. v. Castle*,  
20 2011 WL 6141310, at \*15 (N.D. Cal. Dec. 8, 2011) (dismissing respondeat superior cause of action  
21 without leave to amend); *Animal Legal Def. Fund v. HVFG LLC*, 2013 WL 3242244, at \*3 (N.D. Cal  
22 June 25, 2013); *Moore v. Comcast Sportsnet*, 2013 WL 451665, at \*2 (N.D. Cal. Feb. 4, 2013).  
23 Because Plaintiff's cause of action for respondeat superior does not present a cognizable claim, it is  
24 subject to dismissal with prejudice.

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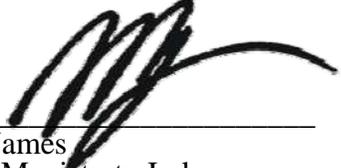
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**V. CONCLUSION**

For the reasons set forth above, the Court **GRANTS** VanDyk's Motion to Dismiss (Dkt. No. 6) as follows: (1) Plaintiff's claim for professional negligence is **DISMISSED WITHOUT PREJUDICE**; (2) Plaintiff's claim for respondeat superior is **DISMISSED WITH PREJUDICE**. Plaintiff. The Court further **GRANTS** Plaintiff leave to file an amended complaint no later than December 9, 2013.

**IT IS SO ORDERED.**

Dated: November 18, 2013



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Maria-Elena James  
United States Magistrate Judge