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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CANTON MORTGAGE, INC. DBA)CASE NO. 37-2029-001111-CU-BY-CTL

CANTON LENDERS MORTGAGE GROUP AND)

PLAINTIFF'S MEDIATION BRIEF

ON BEHALF OF ALL OTHERS SIMILARLY)

SITUATED,)

PLAINTIFF,)

VS.)

ESTATERATE, LLC, A LIMITED)

LIABILITY COMPANY; MICHEL DIXON,)

AN INDIVIDUAL, ABS PROPERTY
APPRAISALS, A)

BUSINESS ENTITY, FORM UNKNOWN;)

AND DOES 1-20, INCLUSIVE,)

Defendants.)

21 **Introduction**

22 Plaintiff is a lender. It used the services of EstateRate, LLC, (“EstateRate”) an Appraisal
23 Management Company (“AMC”). EstateRate selected one appraisal company to conduct
24 approximately 18 appraisals for Plaintiff. The appraisal company, ABS Property Appraisals (defendant Michel
25 Dixon’s business name), used the credentials, name and signature of two licensed appraisers without
26 their knowledge or permission to prepare appraisals for Plaintiff. Plaintiff used these appraisals for
27 purposes of originating loans secured by residential real property. In August of 2017, Plaintiff
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1 discovered that the appraisals performed by ABS Property Appraisals were, in fact, performed by Michel
2 Dixon, who was not and is not a licensed appraiser. Because the loans were originated with
3 fraudulent appraisals, Plaintiff had to refinance the loans at a loss or repurchase them from the
4 investors it sold them to.

5 **Facts**

6 Plaintiff is a loan originator. Its business model involves originating loans using warehouse
7 lines of credit and then selling the loans to investors within days or weeks of origination. It makes
8 these loans based on the underwriting requirements of the investors it intends on selling these loans
9 to. The contracts in place between Plaintiff and its investors require each loan to have an appraisal of
10 the property securing the loan. That appraisal has to be conducted by a licensed appraiser.

11 Plaintiff ordered approximately 18 appraisals from EstateRate from 2016 to August of 2017
12 and originated loans based on all of those appraisals. EstateRate is an AMC. An AMC is a service
13 that acts as the interface between a loan originator and an appraiser to coordinate everything from the
14 scheduling of the appraisal through any post appraisal questions that arise in the underwriting
15 process. The originator communicates with the AMC and the AMC communicates with the
16 appraiser. The AMC usually takes the payment for the appraisal, takes its cut and then pays the
17 appraiser.

18 In or about August of 2017, Plaintiff discovered that the appraiser whose name appeared on
19 one of the appraisals it ordered through EstateRate was not the appraiser who purportedly signed
20 the appraisal and whose insurance certificate was attached to the appraisal. Neal Jasperson, whose name
21 and credentials appeared on the Kimbethmont appraisal, was not the person who actually performed the
22 appraisal. After a review of all of the appraisals ordered through EstateRate and purportedly
23 performed by Jasperson and discussions with Jasperson, it was discovered that they were likely all (12)
24 performed by Dixon ("Jasperson Appraisals") and certainly not performed by Jasperson.

25 Another 6 loans were discovered that Plaintiff ordered from EstateRate that were likely
26 performed by Dixon, though they purported to be performed by a different licensed appraiser after
27 the lawsuit was filed ("Emmersen Appraisals). Because Plaintiff could not know about an appraisal that
28 was not performed by the person that signed it, Plaintiff did not find out about the other 6 fraudulent

1 appraisals until EstateRate disclosed 6 other appraisals it managed for Plaintiff in its responses to
2 discovery that it believed were performed by Dixon. The principal for Plaintiff did discuss this issue
3 with the principal for EstateRate prior to the lawsuit being filed when the Jasperson Appraisals were
4 discovered. However, EstateRate did not disclose the Emmersen Appraisals at that time.

5 EstateRate does not dispute that Dixon fraudulently prepared appraisals using the names
6 of licensed appraisers. In fact, EstateRate filed a report with the California Bureau of Real Estate
7 Appraisers regarding the matter and has not disputed the fact that the 18 appraisals at issue were
8 performed by someone other than the appraiser whose signature appears on the appraisal. For his
9 part, Dixon's counsel stated, in response to a deposition notice, that Dixon will exercise his 5th
10 Amendment privilege in response to questions regarding this lawsuit due to an ongoing criminal
11 investigation.

12 **Liability**

13 Plaintiff named EstateRate to causes of action for Negligence, Negligence Per Se, Breach
14 of Contract, Negligent Misrepresentation and Business & Professions Code Section 17200. Plaintiff
15 named Dixon and ABS Property Appraisals to causes of action for fraud and Business & Professions Code
16 Section 17200.

17 Dixon's liability for fraud is clear. He signed appraisals using the names of other licensed
18 appraisers and purported to be those appraisers. He also attached insurance certificates of those
19 appraisers to the appraisals he prepared in their names. Based on the lack of any denial by Dixon that
20 he prepared these appraisals, his claim that he will assert his 5th Amendment privilege with respect to
21 these claims and the testimony of the other appraisers that they did not have anything to do with the
22 appraisals in question will establish liability. In fact, Plaintiff could bring a motion for summary
23 judgment against Dixon and he would not be able to provide any evidence in his defense. A fact
24 finder may not hold his exercise of the privilege against him, but it will mean that he can't present a
25 defense. Oliye v Fox (2012) 21 Cal.App.4th 1036, 1055.

26 EstateRate's responsibility for the acts of Dixon fall within basic negligence, negligence
27 per se and negligent misrepresentation theories. An AMC has very limited duties and
28 responsibilities. Per the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010

1 (“Dodd Frank Act”), AMC’s are charged with, “manag[ing] the process of having an appraisal
2 performed, including providing administrative duties such as receiving appraisal orders and appraisal
3 reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from
4 creditors and underwriters for services provided, and reimbursing appraisers for services performed.”
5 12 U.S.C. § 3350(11)(c). The Dodd Frank Act required states to enact laws for AMC’s to provide
6 minimum standards for appraisals, including: “(1) register with and be subject to supervision by a
7 State appraiser certifying and licensing agency in each State in which the company operates and (2)
8 **verify that only licensed or certified appraisers are used for federally related transactions.**” 12
9 U.S.C. § 3353 (emphasis added).

10 California implemented the Dodd Frank Act standard via 10 CCR § 3577 by requiring that
11 AMC’s, “will delegate appraisal assignments for completion only to independent contractor
12 appraisers that possess the licenses and certificates required by the Office (of Real Estate Appraisers)
13 and (2) Appraisal Management Companies must adopt reasonable procedures designed to ensure that
14 all appraisal assignments completed by its independent contractor or employee appraisers are
15 performed in accordance with the Uniform Standards of Professional Appraisal Practice [USPAP].”
16 So, EstateRate failed in its most basic task as an AMC in not assigning a licensed appraiser to
17 conduct at least 18 appraisals for Plaintiff. It also did not have reasonable procedures in place to
18 ensure that appraisal assignments were completed in accordance with the USPAP (which prohibits an
19 appraiser from misrepresenting his role when providing services and must not report or permit
20 another person to communicate a misleading or fraudulent report (USPAP, Ethics Rules)).
21 EstateRate did this by assigning ABS Property Appraisals/Dixon to appraise the properties at issue and
22 receiving appraisals purportedly performed by two different appraisers.

23 Based on a review of the communications between EstateRate and Dixon, it should have
24 been clear to EstateRate that Dixon was performing the appraisals. With respect to scheduling the
25 appraisals and any questions regarding the reports, they were all answered by Dixon and not the
26 actual appraiser. The communications produced by EstateRate also indicated that EstateRate
27 may have had reservations about Dixon, but was using ABS Property Appraisals because it needed to get
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1 orders filled. This may have also led to EstateRate ignoring the fact that these appraisals were
2 being performed by an unlicensed appraiser.

3 Thus, under basic a basic negligence analysis, EstateRate had a duty to Plaintiff to assign
4 licensed appraisers to conduct the appraisals ordered by Plaintiff, it breached its duty by assigning the
5 tasks to an unlicensed appraiser and, as a result, Plaintiff suffered damages. The analysis under a
6 negligence per se theory creates a presumption of liability for EstateRate. The presumption arises
7 if (1) the defendant violated a statute; (2) the violation proximately caused the plaintiff's injury; (3)
8 the injury resulted from the kind of occurrence the statute was designed to prevent; and (4) the
9 plaintiff was one of the persons the statute was intended to protect. Jasperson Farms/Del Cabo, Inc. v.
10 Western Farm Service, Inc. (2010) 190 Cal.App.4th 1502, 1526.

11 There is no doubt that statutes were violated and that the violation directly caused the
12 Plaintiff's injuries. The purpose of the appraisal independence rules established by the Dodd Frank
13 Act was to prevent loan originators from influencing the appraiser. This was a factor in the 2008 real
14 estate crash that preceded the Dodd Frank Act. The appraisal is prepared for the lender to establish
15 that its security interest is covered by the value of the security. So, having a licensed appraiser
16 perform the appraisal is part of what the statute was designed to ensure. As a lender, Plaintiff was one
17 of the parties that the statute was designed to protect.

18 EstateRate may seek to deflect its responsibility under this theory by claiming that it was
19 excused from liability based on Dixon's fraud. However, it would be hard to excuse such liability
20 when EstateRate's primary responsibility was making sure that a licensed appraiser performed the
21 appraisals. Additionally, as stated herein, EstateRate should have known from the communications
22 with Dixon regarding the appraisals that it was Dixon who was performing the appraisals.

23 Under a negligent misrepresentation theory Plaintiff will establish that EstateRate
24 represented that it was assigning licensed appraisers, which is its duty under the law, that
25 representation wasn't true, it had no reasonable ground to believe the representation was true because
26 in the numerous communications with ABS Property Appraisals about the appraisals they never communicated
27 with anyone other than Dixon. EstateRate certainly intended on Plaintiff relying on the
28 representation because it's contract with Plaintiff stated it was to provide Appraisal Management

1 Services (which, by law, involves the verification of licensed appraisers for its customers). Plaintiff
2 relied on the representation because it originated loans with the appraisals. Plaintiff was harmed
3 because it had to refinance and repurchase the loans originated with the appraisals. Finally, the
4 reliance on the representation was the sole factor in causing the damage. Ragland v. U.S. Bank
5 National Assn. (2012) 209 Cal.App.4th 182, 196.

6 Under a breach of contract theory, Plaintiff will prevail as well. Plaintiff and EstateRate
7 entered into a contract for EstateRate to provide it with Appraisal Management Services. It
8 breached that contract by not performing the tasks of an Appraisal Management Company because it
9 provided an unlicensed appraiser to appraise properties for Plaintiff. As a result of that breach,
10 Plaintiff is entitled to damages that were a consequence of the breach that were reasonably to be
11 considered as a likely consequence of the breach. Stevens Group Fund IV v. Sobrato (1991) 1
12 Cal.App.4th 886, 892. It was certainly reasonable to expect that a lender would be liable for the
13 repurchases and refinances of loans that were originated using appraisals not prepared by licensed
14 appraisers.

15 Plaintiff also named the defendants to a cause of action under Business & Professions Code
16 Section 17200 et seq. While this cause of action does not provide for additional monetary damages
17 to Plaintiff for its losses, it gives Plaintiff the right to bring an action on behalf of the other lenders
18 that were similarly harmed due to the acts of EstateRate and attorney's fees under Civil Procedure
19 Section 1021.5 for conferring a public benefit. Discovery has been propounded on this issue and
20 Plaintiff remains committed to certifying a class with respect to this matter.

21 **Damages**

22 The damage calculation related to the loans is a little more complex than submitting an invoice
23 for a loss. To explain the loss, a brief explanation of Plaintiff's business model is necessary. Plaintiff
24 lends money with credit lines it has for this purpose and then sells the loans to investors. Plaintiff is
25 not in the business of holding loans in its portfolio and does not do so. Plaintiff is a party to contracts
26 with investors that contain representations and warranties requiring indemnity or repurchase of loans
27 if said loan file contain any misrepresentation or any information in the loan file is not correct. Many
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1 of the contracts also contain specific provisions that require the loan file include an appraisal
2 prepared by a properly licensed appraiser.

3 In any event, a loan file with an appraisal that was not signed by the person whose name
4 appears on the appraisal and that was prepared by someone without a license constitutes a breach of
5 the representations and warranties of any contract Plaintiff has with an investor. Plaintiff could not
6 just ignore these issues and hope that no one found out. The contracts require that Plaintiff notify the
7 investor if it ever discovers a breach of a representation and warranty. Plaintiff would not risk an
8 incurable repurchase demand at some point in the future without any ability to recover for its loss
9 from the responsible party or risk its contractual relationship with the investors that it sells its loans to
10 by not disclosing the information.

11 Immediately upon discovering the appraisal issue, Plaintiff assessed all of the loans with the
12 Jasperson Appraisals to determine which loans could be refinanced, as that would be the cheapest and
13 easiest way to cure. Not all of the loans could be refinanced due to the type of loan, the value of the
14 property and the fact that interest rates had gone up from when the loans were originated. When it
15 discovered the Emmersen Appraisals a year later, it did the same as to those loans.

16 Damages related to loans that were refinanced include payment of the costs associated with
17 the loan, a buy down of the rate to entice the borrower to refinance a loan he/she just received,
18 payment of the loan officer commission and payment to the original lender for an early pay off
19 (“EPO”) (some investors have contractual provisions that penalize the lender if a loan is paid off
20 within a certain period of time.)

21 For the loans that could not be refinanced, Plaintiff notified the investors of the appraisal
22 issue. Fortunately, a few of the properties securing the loans had so much equity that the loan issue
23 was resolved by getting new appraisals. The rest of the loans required Plaintiff to purchase the loan
24 back from the investor and then sell it on a “scratch and dent” basis to a third party that will pay a
25 percentage of the unpaid principal balance on the loan due to the defect. The damages for the sale
26 include the difference between the unpaid principal balance and the sale price, the premium that
27 Plaintiff earned when it originally sold the loan to the investor (“SRP”) and the loss from paying
28 commissions to the loan officer on a loan that Plaintiff had to repurchase.

1 For one of the loans, the investor has insurance, which will minimize the repurchase loss to no
2 more than \$10,000, plus the profit earned by Plaintiff and the commission to the loan officer. Finally,
3 a few of the loans were paid off on their own by the time the issue was discovered and no damages
4 were incurred.

5 The below calculations establish Plaintiff's loss. Most of the supporting documents were
6 already produced in discovery. The rest of them were provided to EstateRate in advance of the
7 mediation.

8 *Barrera – Refinanced –*

9 \$4,068.85 – includes Plaintiff paying for all loan costs and buy down of rate

10 *Shastri – Loan repurchased by Plaintiff –*

11 \$1,477.57 SRP

12 *Overton– Refinanced*

13 \$3,000 lender credit to pay closing costs and buying down rate

14 \$4,050 paid to loan officer for doing refinance.

15 *Romero – Loan repurchased by Plaintiff.*

16 \$32,032.51 - Difference between unpaid principle balance and scratch and dent sale price

17 \$13,247 - Service release premium

18 \$6,720 - Loan officer commission

19 *Lopez - Refinanced*

20 \$11,635.34 - EPO

21 \$3,729.76 - Commission to Loan Officer

22 \$6,045.14 - Lender Credit

23 *Osgood- Refinanced*

24 \$7,634.12 - Lender Credit

25 \$4,148 – Loan officer commission.

26 *Kimbethmont- Refinanced*

27 \$2,336.59 -Closing costs for refinance

1 \$3,937.50 - Commission to Loan Officer for first loan that couldn't be sold due to appraisal.

2 *Falconer* – Early payoff fee for refinancing the loan.

3 \$17,071.25 -EPO

4 *Cervantes*– Repurchase requested. Plaintiff was able to cure.

5 Cost of additional appraisals - \$500

6 *Bebenek*– Repurchase completed.

7 \$6,125.31 SRP

8 \$3,408 Loan officer commission

9 \$23,275.72 Loss on loan as difference between loan balance at time of sale and
10 purchase price to scratch and dent purchaser.

11 *Katabien* – repurchase requested – Plaintiff is in the process of contesting but it is unlikely to win
12 contest. Loss will by premium plus insurance premium for this covered loan.

13 \$9,565.98 -Return of SRP

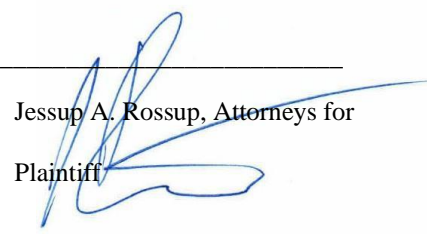
14 \$10,000 - Insurance premium for investor on certified loan (see section 7.5.1 of Plaza
15 Correspondence Guide).

16 ***Total loss - \$166,374.52.***

17 Plaintiff is disinclined to bargain. We are not concerned with issues of liability, as there is
18 very clear liability on the part of both defendants. No offers have been exchanged. Discussions of
19 damages have been on going due to the fact that it took time to liquidate all of Plaintiff's damages.
20 But, at this point, they are essentially fully liquidated.

21 Dated: February 6, 2019

MARSTEN & HUDSONNE, P.C.

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Jessup A. Rossup, Attorneys for
Plaintiff