UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONSUMER FINANCIAL PROTECTION BUREAU, Plaintiff, v. 1ST ALLIANCE LENDING, LLC, JOHN CHRISTOPHER DIIORIO, KEVIN ROBERT ST. LAWRENCE, and SOCRATES ARAMBURU, Defendants.	:	Case No. 3:21-cv-55 (RNC)

RULING AND ORDER

The Consumer Financial Protection Bureau ("CFPB") brings this suit against 1st Alliance Lending, LLC ("1st Alliance") and its owners and corporate officers John DiIorio, Kevin St. Lawrence, and Socrates Aramburu ("the individual defendants"), alleging violations of federal consumer financial laws. 1st Alliance has moved to dismiss the Amended Complaint in part, and has moved in the alternative for a more definite statement as to Count One. The individual defendants have moved to dismiss all claims against them. For the reasons below, 1st Alliance's motion is denied, and the individual defendants' motions are granted in part and denied in part.

I. Background

The Amended Complaint alleges the following. 1st Alliance is a non-depository mortgage company, ECF No. 27 ¶ 1. At all

relevant times, DiIorio was 1st Alliance's CEO, id. ¶ 13, St. Lawrence was its President of Production, id. ¶ 14, and Aramburu was its President of Capital Markets, id. ¶ 15.

From around 2015 to 2019, 1st Alliance's business model relied on sales employees called Submission Coordinators ("SCs") or Home Loan Consultants ("HLCs"), who were the "primary consumer point of contact throughout the mortgage-origination process." Id. ¶¶ 18-21. As such, the SCs/HLCs performed duties that would have required them to hold a mortgage-originator license in every state in which 1st Alliance operated, id. ¶ 22, but 1st Alliance never required its SCs or HLCs to be licensed in any state, id. ¶ 23. By 2017, 1st Alliance's compliance department began raising concerns to company leaders, including the individual defendants, that SCs were engaging in activities that would require licensing under state and/or federal law. Id. ¶¶ 35-36.

Unlicensed SCs/HLCs held themselves out as licensed via solicitation emails and social media profiles. Id. ¶ 48-50. Further, 1st Alliance representatives required prospective borrowers to submit certain documents before receiving Loan Estimates, id. ¶ 76, denied them credit without giving required written notices, id. ¶¶ 38-41, and made false and misleading statements regarding their eligibility for refinancing programs and those programs' terms, id. ¶¶ 44-47.

Each individual defendant was "responsible for and approved 1st Alliance's business model, including the particular duties assigned under that model to unlicensed personnel such as SCs and HLCs, as well as to licensed MLOs." Id. ¶ 55. Each one also had "knowledge of and approved" 1st Alliance's "policies and procedures," including those related to federal and state licensing laws, as well as its "sales practices and the specific functions performed by those in particular job roles." Id. ¶¶ 56-57; 62.

DiIorio, as CEO, was responsible for the day-to-day executive management of 1st Alliance, and "frequently interacted with others at 1st Alliance concerning the structure and nature of the company's mortgage-origination business, including the specific roles played in that structure by sales staff and others, including SCs, HLCs, and MLOs. DiIorio directed and approved changes to those roles and interacted with 1st Alliance's compliance and legal functions in doing so." Id. ¶ 58. St. Lawrence, as President of Production, was responsible for and oversaw the structure and operation of sales, which included SCs, HLCs, and MLOs. Id. ¶ 60. He also controlled the offices where the sales staff worked and where the call center was located. Id. ¶ 61.

Counts One and Two charge 1st Alliance with violating Regulation Z, which implements the Truth in Lending Act

("TILA"), by failing to ensure that its loan officers were licensed and requiring verifying documents from the consumer before a Loan Estimate was issued. Counts Three, Four, and Five charge all defendants with violating the Consumer Financial Protection Act of 2010 ("CFPA") by engaging in deceptive and unfair acts and practices. Count Six charges 1st Alliance with violating the Mortgage Acts and Practices ("MAP") Rule by making material misrepresentations to consumers. Counts Seven and Eight charge 1st Alliance with violating the Equal Credit Opportunity Act ("ECOA") and the Fair Credit Reporting Act ("FCRA") by failing to provide required notices to consumers who were denied credit. Finally, Count Nine charges 1st Alliance with violating the CFPA based on its violations of "federal consumer financial law."

1st Alliance has moved to dismiss Counts One, Two, Six, and Nine (to the extent it incorporates Counts One, Two, and Six) for failure to state a claim. ECF No. 33. The individual defendants have moved to dismiss all claims against them. ECF No. 32.

I. Legal Standard

Under Rule 12(b)(6), a complaint is properly dismissed when it fails to state a claim upon which relief may be granted. To withstand a properly supported motion to dismiss under this Rule, a complaint must present a claim that is "plausible on its

face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The plausibility standard requires a plaintiff to plead factual allegations permitting a reasonable inference that the defendant is liable for the alleged wrong.

II. 1st Alliance's Motion to Dismiss

a. Count One: Regulation Z — Failing to Ensure that Loan Originators Were Licensed

The CFPB alleges in Count One that 1st Alliance failed to ensure that its SCs and HLCs were licensed, in violation of Regulation Z. 12 C.F.R. § 1026.1. Regulation Z was promulgated to implement the Truth in Lending Act ("TILA"), 15 U.S.C § 1601 et seq., which was itself enacted to encourage the informed use of credit by assuring meaningful disclosure of credit terms to consumers. Under Regulation Z, a "loan originator organization" must ensure that "each individual loan originator who works for [it] is licensed" to the extent required "under the SAFE Act, its implementing regulations, and State SAFE Act implementing law before the individual acts as a loan originator in a consumer credit transaction secured by a dwelling." 12 C.F.R. § 1026.36(f)(2).

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 ("SAFE Act"), 12 U.S.C. § 5101, et seq., encouraged states to implement state versions of the SAFE Act, with the minimum standards in the federal statute as a floor. 12 C.F.R.

§ 1008.1(b). The federal SAFE Act defines "loan originator" as an individual who (A) takes a residential mortgage loan application and (B) offers or negotiates terms of a residential mortgage loan for compensation or gain. 12 U.S.C. § 5102(4) (emphasis added). Under its implementing regulations, an individual engages in the business of a loan originator if the individual, "in a commercial context and habitually or repeatedly: (i) takes a residential mortgage loan application; and (ii) offers or negotiates terms of a residential mortgage loan compensation or gain." 12 C.F.R. § 1008.103(a)(b)(1) (emphasis added).

CFPB alleges that since enactment of the SAFE Act, every state has enacted implementing legislation that expands the category of individuals who must be licensed by broadening the definition of "loan originator" to include an individual who, for compensation or gain or the expectation of compensation or gain, either "takes a residential mortgage loan application" or "offers or negotiates terms of a residential mortgage loan." ECF No. 27 ¶ 68. It also alleges that each SC and HLC performed either or both of the above functions, so that in every state in which 1st Alliance operated, they should have been licensed under state SAFE Acts. Id. ¶ 72. Because Regulation Z requires 1st Alliance to ensure that its employees are licensed in compliance with the federal and state SAFE Acts, CFPB alleges,

1st Alliance violated Regulation Z (and therefore TILA, which Regulation Z implements).

1st Alliance contends that this count must be dismissed on the ground that, although TILA and the federal SAFE Act each require licensing for statutorily defined "loan originators" (or "mortgage originators"), neither statute requires a creditor to ensure that its individual employees are licensed and, to the extent Regulation Z does so, it constitutes an impermissible exercise of agency authority. ECF No. 33 at 9-10.

This argument is unavailing. TILA, as amended by the Dodd-Frank Act, provides in part that "[s]ubject to regulations prescribed under this subsection, each mortgage originator shall . . . be qualified and, when required, registered and licensed as a mortgage originator in accordance with applicable State or Federal law, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008." 15 U.S.C. § 1639b(b). And TILA directs the Bureau to "prescribe regulations to carry out the purposes of [TILA]," which "may contain such additional requirements, classifications, differentiations, or other provisions . . . as in the judgment of the Bureau are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. § 1604(a). In other words, in order for a mortgage originator to be qualified in compliance with TILA,

it must also comply with requirements promulgated by the CFPB. One such requirement obligates loan originator organizations to ensure that individual loan originators working for them are licensed or registered as required by state and federal laws. This requirement is clearly authorized by the statutory grant of authority – if loan originator organizations were allowed to employ unlicensed loan originators to do work that requires a license under state and federal law, TILA's requirement that mortgage originators comply with state and federal licensing requirements would lack efficacy.

1st Alliance's argument that Regulation Z uses the term "loan originator" rather than "mortgage originator," as TILA does, and therefore cannot be an interpretation of TILA, is unpersuasive. The SAFE Act, i.e., the main federal statute governing licensing, which TILA references, uses "loan originator."[1]

Alternatively, 1st Alliance moves under Fed. R. Civ. P. 12(e) for a more definite statement of the state licensing laws it allegedly violated. 1st Alliance argues that because the

[1] Because I conclude that Regulation Z is authorized under § 105(a) of TILA, I do not address CFPB's argument based on § 129B(e) of TILA, which authorizes the Bureau "to prohibit or condition terms, acts, or practices relating to residential mortgage loans on a variety of bases, including when the Bureau finds the terms, acts, or practices are not in the interest of the consumer." ECF No. 36 at 4.

applicable state statutes are not listed in the Amended Complaint, it is unable to prepare a defense. ECF No. 33 at 11-12. CFPB responds that it is suing under federal law, not state law, and need not plead each state statute in detail since they do not differ in ways material to this claim.

1st Alliance's argument has some force. But there is no need for repleading because 1st Alliance can obtain the information it seeks through a contention interrogatory. See Fed. R. Civ. P. 33(a)(2). At oral argument, all counsel expressed support for this approach. Accordingly, 1st Alliance's motion with regard to Count One is denied.

b. Count 2: Regulation Z — Requiring Consumers to Submit Verifying Documents Before Providing a Loan Estimate

Regulation Z provides that a creditor "shall not require a consumer to submit documents verifying information related to the consumer's application before providing" disclosures known as a Loan Estimate. 12 C.F.R. § 1026.19(e)(2)(ii), (iii). 1st Alliance argues that asking for verifying documentation before providing a loan estimate would not violate Regulation Z for two reasons: first, because the prohibition on requiring verifying information is triggered only when the "application" is complete; and second, because the regulation's Official Commentary provides that "the creditor . . . may collect from the consumer any information that it requires prior to providing

the early disclosures . . . .” 12 C.F.R. § 1026, Supp. I, Part 2. Neither argument is persuasive.

Defendant’s contention that “the Loan Estimate disclosure requirement is not triggered until a lender obtains all six parts of the ‘application,’” ECF No. 33 at 15-16,[2] (because before that moment no completed “application” exists) is untenable. As CFPB points out, under that interpretation of Regulation Z, lenders “(1) may require verifying documents from a consumer until the consumer submits an application; then (2) may not require such documents until a Loan Estimate is issued; and then (3) may require such documents again.” ECF No. 36 at 10. This strained reading would undermine the regulation’s purpose, which is “to prevent overly burdensome documentation demands on mortgage applicants, and to facilitate shopping by the consumer.” Final Rule, Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79730, 79816 (Dec. 31, 2013) (to be codified at 12 C.F.R. Parts 1024 and 1026).

[2] These components are “the consumer’s name, the consumer’s income, the consumer’s social security number to obtain a credit report, the property address, an estimate of the value of the property, and the mortgage loan amount sought.” 12 C.F.R. § 1026.2(a)(3).

And, while the rule's commentary says a lender can collect "information," prior to providing a loan estimate, "the creditor . . . is not permitted to require, before providing the [Loan Estimate], that the consumer submit documentation to verify the information collected from the consumer," 12 C.F.R. Pt. 1026, Supp. I, Part 2 (emphasis added), which is what the Amended Complaint alleges 1st Alliance did. ECF No. 27 ¶ 76.

Finally, 1st Alliance asserts that the Amended Complaint fails to plead "a single instance, example, or practice" of the conduct at issue in Count Two. But the Amended Complaint alleges, among other things, a practice: "Following company policy, 1st Alliance employees regularly required consumers to submit documents for verification before issuing the consumer a Loan Estimate, in violation of the Truth in Lending Act and Regulation Z." ECF No. 27 ¶ 3. Accordingly, 1st Alliance's motion is denied as to Count Two.

a. Count Six: MAP Rule

The MAP Rule prohibits "any person" from "mak[ing] any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product." 12 C.F.R. § 1014.3. CFPB alleges that 1st Alliance representatives violated the MAP rule by making false and misleading statements to prospective borrowers regarding

their eligibility for refinancing programs and those programs' terms.

As a threshold matter, it is necessary to determine the applicable pleading standard. While the Federal Rules of Civil Procedure generally require that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Specifically, Rule 9(b)'s heightened standard requires a complaint to "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004) (quoting Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993)) (internal quotation marks omitted). 1st Alliance urges me to apply Rule 9(b)'s standard, because the conduct alleged "sounds in fraud." Rombach, 355 F.3d at 171. CFPB argues that claims based on consumer protection laws, even if they involve elements of deception, are not subject to Rule 9(b), in part because they are strict liability laws with a remedial purpose. ECF No. 36 at 12.

The Second Circuit in Rombach held that Rule 9(b) applies to securities claims brought under Section 11 and Section

12(a)(2) of the Securities Act of 1933 "when premised on averments of fraud," even though allegations of negligence would also trigger liability under the statute. 355 F.3d at 170. In other words, under Rombach, Rule 9(b)'s applicability depends on "the conduct alleged, and is not limited to allegations styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action." Id. at 171.

But, as CFPB points out, Rombach is a private securities fraud case, and is therefore distinguishable from this consumer protection action. Courts within this Circuit have declined to apply Rule 9(b)'s requirements in the context of consumer protection claims. See Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 768 (S.D.N.Y. 2018), amended, No. 17-CV-890 (LAP), 2018 WL 11219167 (S.D.N.Y. Sept. 12, 2018), vacated and remanded, 828 F. App'x 68 (2d Cir. 2020), and aff'd in part, rev'd in part and remanded, 828 F. App'x 68 (2d Cir. 2020); see also People v. Debt Resolve, Inc., 387 F. Supp. 3d 358, 365 (S.D.N.Y. 2019) ("As other courts have reasoned, Rule 9(b) by its terms applies only to 'fraud or mistake,' and therefore its application to claims brought under consumer protection statutes is inappropriate, even if those claims have a 'deceptive dimension.'" (quoting Consumer Financial Protection Bureau v. Navient Corp., 3:17-CV-101, 2017 WL 3380530 at *24 (M.D. Pa. Aug. 4, 2017)). But see Meserole v.

Sony Corp., No. 08 Cv. 8987, 2009 U.S. Dist. LEXIS 42772, at *9 (S.D.N.Y. May 18, 2009) ("[W]hile traditionally associated with claims of securities fraud, Rule 9(b) has been applied to claims of consumer fraud as well as claims relating to consumer protection statutes"). Since Rombach, the Second Circuit has declined to apply Rule 9(b) to state consumer protection law claims when the cause of action "d[id] not require proof of the same essential elements (such as reliance) as common-law fraud." Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005). Though the CFPB alleges 1st Alliance made misrepresentations "to induce consumers to obtain a purchase mortgage," ECF No. 27 ¶ 9, an allegation that may "sound in fraud," any material misrepresentation would constitute a MAP Rule violation, regardless of intent or reliance. Accordingly, I will apply Rule 8, not Rule 9(b).

1st Alliance argues that the Amended Complaint fails to state a claim, given "CFPB does not identify a single specific misrepresentation, any particular speaker or consumer involved, when any misrepresentation may have occurred, or any other facts that would provide 1st Alliance enough information to prepare a defense, let alone establish the required elements of the alleged violation." ECF No. 39 at 10.

The Amended Complaint alleges that 1st Alliance representatives "repeatedly" told consumers they "would qualify

for one of 1st Alliance's mortgages" in situations in which "1st Alliance had already received information from the consumer that would disqualify the consumer from receiving a 1st Alliance mortgage" and 1st Alliance "later disqualified" the consumer. ECF No. 27 ¶ 121. According to the Amended Complaint, 1st Alliance representatives "often" told consumers "that after six months of satisfactory payments, the consumer could obtain a significantly better rate through a Streamline refi than under [a] purchase mortgage," when, in fact, the representatives "had no assurance" that with on-time payments "the consumer would qualify for a Streamline refi loan" or "that the rate would be significantly better . . . ." Id. ¶¶ 45, 46; see also id. ¶ 122. Finally, the Amended Complaint alleges that 1st Alliance representatives "frequently told consumers that the consumer could obtain a Streamline refi at no cost to the consumer when, in fact, this was not true." Id. ¶¶ 47; see also id. ¶ 122. These allegations are more than sufficient to meet the pleading standards of Rule 8. Accordingly, the motion to dismiss Count Six is denied.

b. Count Nine: CFPA Violations Based on Violations of Federal Consumer Financial Law

Count Nine claims that each violation alleged in counts one through eight "is also a violation of § 1036 of the CFPA." ECF No. 27 ¶ 134. Section 1036 of the CFPA contains a "catch-all"

provision that makes unlawful "any act or omission in violation of a Federal consumer financial law[.]" 12 U.S.C. § 5536(a)(1)(A). Because the counts alleging predicate violations survive, so does Count Nine.

III. Individual Defendants' Motion to Dismiss

Counts three, four, and five allege that the defendants violated the CFPA's prohibition on unfair, deceptive, or abusive acts or practices ("UDAAP"). 12 U.S.C. §§ 5531(a), 5536(a)(1)(B). The individual defendants have moved to dismiss all three counts for failure to state a claim.

a. Applicable Pleading Standard

Here again, the parties disagree as to the applicable pleading standard. Courts are divided on the issue. See CFPB v. Prime Mktg. Holdings, LLC, 2016 WL 10516097 at *16 (C.D. Cal. Nov. 15, 2016). But "the overwhelming weight of precedent" militates against applying Rule 9(b) to CFPA claims, CFPB v. Think Fin., LLC, No. CV-17-127-GF-BMM, 2018 WL 3707911, at *8 (D. Mont. Aug. 3, 2018), including at least one case from within this circuit, CFPB v. RD Legal Funding, LLC, 332 F. Supp. 3d at 768. Therefore, I will apply the Rule 8 standard.

b. Individual Liability Standard

The parties disagree as to the standard for individual liability for UDAAP violations under the CFPA. CFPB favors the standard used to determine individual liability under the

Federal Trade Commission Act ("FTCA"). Under the FTCA, individuals may be liable for unfair or deceptive acts and practices when they "participated directly in the practices or acts or had authority to control them" and "had or should have had knowledge or awareness" of the misconduct." FTC v. Moses, 913 F.3d 297, 307 (2d Cir. 2019).

CFPB cites several cases, including from within this circuit, applying the FTCA's individual liability standard to CFPA cases. CFPB v. NDG Fin. Corp., No. 15-CV-5211, 2016 WL 7188792, at *17 (S.D.N.Y. Dec. 2, 2016); CFPB v. Gordon, 819 F.3d 1179, 1193 n.8 (9th Cir. 2016); CFPB v. CashCall, Inc., No. cv-15-7522, 2016 WL 4820635, at *11 (C.D. Cal. Aug. 31, 2016).

Defendants counter that the individuals in those cases did not contest application of the FTCA standard, and they cite the Supreme Court's recent decision in AMG Capital Management, LLC v. FTC, 141 S. Ct. 1341 (2021) for the proposition that "before allowing a common law addition to be grafted onto a statute, the statute's language and structure must be carefully examined to ensure the addition complements rather than conflicts." ECF No. 32-1 at 16. See also Pennsylvania v. Think Fin., Inc., No. 14-cv-7139, 2016 U.S. Dist. LEXIS 4649, at *80 (E.D. Pa. Jan. 14, 2016) (declining to "superimpose" a common-enterprise theory of liability from the FTCA onto the CFPA because 1) the FTCA limits

enforcement to the FTC and 2) the CFPA "is more expansive, including abusive claims as well as unlawful and deceptive.")

The defendants argue that the FTCA's individual liability standard should not be applied because the word "engage" in the CFPA has a different meaning than the word "use" in the FTCA.[3] To "engage" in an unfair, deceptive, or abusive act or practice, defendants argue, "a covered person must take an active part in and directly participate in the act." ECF No. 32-1 at 10. As support for their textual argument, defendants rely on dictionary definitions of "engage." But those definitions do not require direct participation.

Second, defendants argue that because the CFPA already includes a provision under which an individual can be liable for rendering "substantial assistance" to a corporate defendant engaging in UDAAP violations, allowing individual liability under the FCTA's standard in addition to that would undermine the enforcement scheme designed by Congress. ECF No. 32 at 16. However, "a defendant acting with knowledge of deception who

[3] Under the FTC Act, "unfair or deceptive acts or practices in or affecting commerce" are "unlawful," and the FTC is "empowered and directed to prevent" certain persons "from using . . . unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1), (2). Under the CFPA, it is "unlawful" for a covered person or service provider "to engage in any unfair, deceptive, or abusive act or practice" and the Bureau is authorized "to prevent" such a person "from committing or engaging in" such practices. 12 U.S.C. §§ 5536(a)(1)(B), 5531(a).

either directly participates in that deception or has the authority to control the deceptive practice of another, but allows the deception to proceed, engages, through its own actions, in a deceptive act or practice that causes harm to consumers." FTC v. LeadClick Media, LLC, 838 F.3d 158, 170 (2d Cir. 2016). In other words, the parties here are arguing over the standard for direct liability – the fact that a separate theory of liability exists for substantially assisting a corporate defendant's UDAAP violations has no bearing on how courts evaluate whether an individual defendant himself engaged in a UDAAP violation.[4] Accordingly, the FTCA standard applies.

c. Collective Allegations

Defendants argue that the Amended Complaint "lumps" them together and therefore fails to provide notice of what each defendant allegedly did wrong. ECF No. 32 at 12, citing Howard v. Mun. Credit Union, 2008 U.S. Dist. LEXIS 124085, at *40 (S.D.N.Y. Jan. 24, 2008). This argument is unavailing. "Nothing in Rule 8 prohibits collectively referring to multiple defendants where the complaint alerts defendants that identical

[4] To the extent defendants argue that holding them liable would violate principles of Connecticut corporate law governing piercing the corporate veil and respondeat superior liability, the argument misses the point. CFPB is not seeking to impose liability on the individual defendants for the actions of others; it seeks to hold them liable for their own actions. See LeadClick Media, 838 F.3d at 170.

claims are asserted against each defendant." Hudak v. Berkley Grp., Inc., No. 3:13-CV-00089-WWE, 2014 WL 354676, at *4 (D. Conn. Jan. 23, 2014). That is the case here. The Amended Complaint alleges that, consistent with the responsibilities of their leadership positions at 1st Alliance, each of the individual defendants knew of and approved 1st Alliance's "business model," "sales practices," and "policies and procedures," ECF No. 27 ¶¶ 53-62, and knew of and failed to stop the alleged UDAAP violations, even though they had authority to do so, id. ¶¶ 89-90, 105-06, 113-14.[5] These allegations do not "force the various defendants to guess" which of them is accused of each alleged wrong. Ochre LLC v. Rockwell Architecture Planning & Design, 2012 U.S. Dist. LEXIS 172208, at *17 (S.D.N.Y. Nov. 28, 2012). Cf. Bardwil Indus. Inc. v. Kennedy, No. 19 CIV. 8211 (NRB), 2020 WL 5633159, at *3 (S.D.N.Y. Sept. 21, 2020) (granting motion to dismiss where defendants were "corporate officers who had different positions and responsibilities within the company" and complaint lacked

[5] I take judicial notice of the fact that, although CFPB alleges that all three individual defendants were "Managing Members," public records list only DiIorio as a "managing member" – St. Lawrence and Aramburu are listed as "members." ECF No. 32 Ex. A. See iMerchandise Llc LLC v. TSDC, LLC, No. 3:20-cv-248, 2021 U.S. Dist. LEXIS 62134, at *16 n.5 (D. Conn. Mar. 31, 2021) (taking judicial notice of website).

"factual allegations to plausibly explain how the defendants were working in concert").

Having addressed these common issues, I now address each count in turn.

d. Count Three: Deceptive Mortgage-Origination Acts or Practices

Count three alleges that, in violation of the CFPA's prohibition on deceptive practices, "unlicensed SCs and HLCs presented themselves to consumers as licensed mortgage-loan originators by, among things, using a licensed employee's signature block and including their NMLS licensing number in e-mail solicitations to consumers to refinance their mortgages" ECF No. 27 ¶ 80, and "SCs and HLCs created the impression that they were licensed loan originators through social-media profiles and solicitations to consumers for preapprovals." Id. ¶ 81. It also alleges that "[w]hen unlicensed SCs and HLCs performed various tasks and took various information from the consumer, all of which required licensing, they caused consumers reasonably to believe that the SCs and HLCs were legally authorized to do those things when, in fact, the SCs and HLCs were not legally authorized." Id. ¶ 82.

Defendants argue that, even under the FTCA standard, the CFPB fails to state a claim because it "has not alleged that the Individuals had knowledge of the deceptive nature of any alleged

conduct." ECF No. 32 at 19-20. "[K]nowledge 'may be established by showing that the individual [defendant] had actual knowledge of the deceptive conduct, [or] was recklessly indifferent to its deceptiveness, or had an awareness of a high probability of deceptiveness and intentionally avoided learning of the truth.'" Moses, 913 F.3d at 307 (citations omitted). "An individual's degree of participation in business affairs is probative of knowledge." FTC v. Med. Billers Network, Inc., 543 F. Supp. 2d 283, 320 (S.D.N.Y. 2008).

CFPB has plausibly alleged that the individual defendants each had knowledge of the responsibilities assigned to the SCs and HLCs. See ECF No. 27 ¶¶ 55-57, 62. Moreover, CFPB alleges that starting "[n]o later than February 2017," 1st Alliance's chief compliance officer warned the individual defendants "that activities SCs were engaging in could require licensing under federal or state SAFE Acts." ECF No. 27 ¶ 35. It further alleges that "On or about October 2017, 1st Alliance's Compliance Manager notified senior management, including DiIorio and St. Lawrence, that an internal audit had found that SCs 'were at times engaged in what may constitute . . . licensed activity under the SAFE Act.'" Id. ¶ 36. Crediting those allegations, it is reasonable to infer that the individual defendants were at least recklessly indifferent to the

possibility that its sales employees were acting as mortgage loan originators.

Count Three therefore survives insofar as it is based on allegations of unlicensed HLCs and SCs performing duties that would require them to be licensed. See id. ¶ 82. However, the allegations do not support a plausible inference that the individual defendants knew HLCs and SCs were engaging in activities to make it appear they were actually licensed. If CFPB wants to replead this count to provide a stronger basis for such an inference, it may do so.

e. Count Four: Unfair Mortgage-Origination Acts or Practices

In Count Four, The CFPB alleges that 1st Alliance used "unqualified" SCs and HLCs for loan-origination activities that required a license, which was "likely to cause substantial injury to potential borrowers because these employees did not provide critical, accurate, and timely information about loan terms." Id. ¶ 96.

The Amended Complaint plausibly alleges that the duties assigned to SCs and HLCs were subject to the knowledge and approval of the individual defendants. See ECF No. 27 ¶¶ 55-57, 62. In this regard, the Amended Complaint alleges that the "unlicensed SCs and HLCs routinely performed mortgage origination activities as part of their core duties." Id. ¶ 103. It is reasonable to infer that the defendants were aware of such

a routine practice. Moreover, the Amended Complaint plausibly alleges that the individual defendants were on notice that unlicensed employees were performing licensable activities, given the compliance staff's concerns and the results of the internal audit. ECF No. 27 ¶¶ 35-36. Accordingly, the motion is denied as to Count Four.

f. Count Five: Deception Regarding the FHA Streamline Program

According to the Amended Complaint, 1st Alliance "repeatedly made representations to consumers seeking a purchase mortgage about the availability of an FHA Streamline refinance loans, including costs, interest rates, and timing, even though it was impossible for 1st Alliance to know if its misrepresentations were true or accurate." ECF No. 27 ¶ 109. Further, "[t]he Individual Defendants had actual knowledge of how the SCs and HLCs were misrepresenting the Streamline refi program to consumers and encouraged, directed, or failed to prevent such conduct from occurring even though they had the authority to do so" because they "approved all aspects of 1st Alliance's business model, policies and procedures, and sales practices that underlie this claim." Id. ¶ 114.

I conclude that these allegations are insufficient to support a claim. In order to plausibly allege that the defendants knew of the alleged misrepresentations, the complaint must allege that the HLCs/SCs made the misrepresentations

pursuant to or at least consistent with internal policies. Though this may have been the case, CFPB's current allegations are insufficient. Accordingly, Count Five is dismissed without prejudice to refiling.

IV. Conclusion

1st Alliance's motion to dismiss is DENIED. The individual defendants' motion to dismiss is DENIED as to Counts Three and Four and is GRANTED as to Count Five. To the extent that the claims against the individual defendants are dismissed, the dismissal is without prejudice.

So ordered this 31st day of March 2021.

/s/ RNC
Robert N. Chatigny
United States District Judge