No. S____ **S218734**



IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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| HIROSHI HORIIKE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY, a California Corporation, and CHRIS CORTAZZO, an individual,<br><br>Defendants and Respondents. | B246606<br><br>(Los Angeles County Super. Ct. No. SC110477) |

# PETITION FOR REVIEW

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## ISSUE PRESENTED

When the buyer and the seller in a residential real estate transaction are each independently represented by a different salesperson from the same brokerage firm, does Civil Code section 2079.13, subdivision (b), make each salesperson (without their consent) the fiduciary of both the buyer and the seller, with the duties to provide undivided loyalty, confidentiality and counseling to both their own client and the opposing side?

## INTRODUCTION[1]

For the first time in California history, a published opinion (Second Appellate District, Division Five) holds that when the buyer and the seller in a California residential real estate transaction are each independently represented by a different salesperson from the same brokerage, each salesperson becomes a "dual agent"—the fiduciary to *both* the buyer and the seller—by operation of law and without regard to the intentions of the parties or their salespersons. Of course, salespersons and their clients have long enjoyed the freedom to *choose* dual agency in a given transaction.

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[1] Multiple agency relationships arise in real estate sales: (1) a salesperson, commonly known as a real estate agent, has an agency relationship with the client, i.e., the buyer or seller; (2) the broker with whom the salesperson is licensed or affiliated has an agency relationship with the salesperson's client; and (3) the salesperson has an agency relationship with the broker. As a result, references to "agent" and "principal" in real estate statutes and cases can be unclear. For clarity, we describe the parties as salespersons, broker and client (or buyer or seller), and avoid the terms "real estate agent," "listing agent" or "selling agent."

Dual agency at the salesperson level has proven workable where the interests of the buyer and seller are well-aligned.

The trial court had held—in accordance with settled agency-law principles and longstanding real estate practice inside California and across the country—that when the buyer and seller have each chosen to hire their own salesperson, it is only the brokerage, not the individual salespersons, that owes fiduciary duties to *both* parties. Thus, absent contrary agreement, the seller's salesperson is *not* a dual agent but is, instead, only a fiduciary to his client—the seller.

Reversing the trial court, the opinion up-ends California law and creates a public-policy nightmare for prospective buyers and sellers of California residences. Given the prevalence of national and regional brokerage firms, salespersons from the same firm often end up on opposite sides of residential transactions. By transforming each salesperson into the fiduciary of both parties, the opinion deprives buyers and sellers in intra-firm transactions of their *choice* of having the undivided loyalty of an exclusive agent. The salespersons will owe fiduciary duties to parties whose interests inherently conflict. The opinion will force salespersons to harm their original client by disclosing to the other side sensitive information about the client's motivations or the salesperson's personal beliefs. For example, a seller's salesperson would have to disclose to the buyer that the seller needs to close a sale quickly or that the seller has financial difficulties, and the buyer's salesperson would have to disclose to the seller his opinion that he thinks the seller is getting a bad deal.

Also, because fiduciaries owe duties to research and investigate their clients' needs, and to counsel their clients, the opinion forces salespersons to ferret out sensitive information from, and provide counsel to, complete strangers—all against *everyone's* will. The result is perverse, as this case exemplifies. Here, the opinion transforms the seller's salesperson into the buyer's fiduciary, even though they met only once, spoke only a few words to each other, and literally do not even speak the same language.

The opinion will be deeply disruptive. Because compliance with fiduciary duties to one client will frequently entail a breach of fiduciary duties to the other, salespersons risk being sued no matter what they do. The opinion inevitably will trigger an increase in litigation that will cause a concomitant increase in insurance premiums. Alternatively, large firms may avoid intra-firm transactions altogether, which would shut buyers and sellers off from huge portions of the market.

The opinion fails to address any of these important public policy issues. Instead, the holding rests entirely on a highly questionable interpretation of Civil Code section 2079.13, subdivision (b). The opinion construes that subsection as providing that a brokerage firm's duties to the buyer and the seller are imputed to the firm's salespersons. But the notion that the Legislature intended that result is particularly dubious, in light of the fact that the opinion's construction diverges starkly from settled agency law in two crucial respects: (1) it effectively imposes a heretofore unknown doctrine of respondeat *inferior* by imputing the broker's duties as principal *downward* to its agent-salespersons; and (2) it *forces* the salespersons and

non-principal buyer/seller into an agency relationship against their will, even though agency law requires consent. In fact, the legislative history is clear that the legislative goal was to require informational disclosures about *existing* agency law, not to announce a revolution in that law.

The opinion rests on a single sentence buried in Civil Code section 2079.13, subdivision (b), a subsection that merely provides definitions for other statutes. The only logical construction of that sentence—backed by the overall statutory context and language, the legislative history, settled agency law *and* public policy—is that the Legislature intended to confirm that a principal-agent relationship exists between a broker and associate licensees and therefore the licensee's duties are also those of the broker. Thus, as the trial court found, a salesperson's fiduciary duties to the client are imputed to the brokerage firm, as are the salesperson's *non*-fiduciary duties (of honesty and fair dealing) owed to the *non*-client. But the Legislature never intended that an independent salesperson should magically transform into a fiduciary of a non-client simply because a salesperson from the same brokerage firm ends up on the other side.

The Legislature did not intend the chaotic public-policy disaster the opinion will engender. The Court should grant review to resolve these important issues.

## STATEMENT OF THE CASE

### A. Buyer Horiike Retains A Coldwell Salesperson To Locate A Residential Property To Purchase.

Plaintiff Hiroshi Horiike retained Chizuko Namba, a salesperson for defendant Coldwell Banker Residential Brokerage Company ("Coldwell"), to locate a residential property to purchase in California. (Opinion ["Opn."], 3.)

Horiike resides in Hong Kong. (6RT 2542-2543.) Horiike speaks Mandarin Chinese and Japanese; he cannot speak English fluently and reads only "very simple" English words. (6RT 2544.) Salesperson Namba's first language is Japanese and she spoke with Horiike only in Japanese. (9RT 3332.) During the previous four years, Horiike had worked exclusively with Namba as a salesperson, viewing 40 to 50 luxury homes with her for potential purchase. (9RT 3332-3333.)

### B. The Buyer And His Salesperson Consummate A Sale With The Seller And The Seller's Salesperson, Another Coldwell Salesperson From A Different Office.

Salesperson Namba saw a listing for a Malibu residence that was exclusively listed by another Coldwell salesperson, Chris Cortazzo. (Opn. 2-3.) The owners had retained Cortazzo to sell their property; he listed it on a multiple listing service. (Opn. 2.)

Namba was affiliated with Coldwell's Beverly Hills office. (9RT 3335.) Cortazzo was affiliated with Coldwell's Malibu West office. (8RT 3159-3160.)

Namba arranged for Cortazzo to show the property to Horiike. (Opn. 3.) Horiike visited the property on one day only; this was the only time he and the seller's salesperson, Cortazzo, ever met or spoke. (Opn. 3; 5RT 2275; 7RT 2823.) It was also the first time that the two Coldwell salespersons (Namba and Cortazzo) had ever met. (9RT 3335.)

Cortazzo does not speak Mandarin or Japanese. (6RT 2465.) He spoke only briefly with Horiike during the house tour. (5RT 2271-2272.) During the tour, Cortazzo handed Horiike a flier describing the property and a visual inspection disclosure. (Opn. 3-4; 7RT 2753; 9RT 3338.) Their brief conversations that one day, and those two documents, constituted the full extent of Cortazzo's direct contact with Horiike during the entire transaction. (5RT 2275.)

Horiike and Namba drew up a purchase offer the night of the house visit, before Horiike returned to Hong Kong. (9RT 3343-3344.) Escrow opened shortly thereafter and successfully closed within a month. (5RT 2274, 2295-2296.)

### C. The Seller's Salesperson And The Buyer Never Agree To Any Agency Relationship Between Them.

Cortazzo represented the seller only. (6RT 2471-2472; 9RT 3388-3389.) He was never asked and never agreed to represent buyer Horiike.

(6RT 2471-2472; 7RT 2823; 9RT 3338-3389.) Horiike admitted that he never asked Cortazzo to act as his real estate agent, and that he "had nothing to do with" Cortazzo and "only met him once." (7RT 2823.)

No sales or other document listed Cortazzo as an agent for Horiike or as a "dual agent." (E.g., 1AA 17-23 [purchase offers/agreements].) Horiike and the seller both signed a "Confirmation Real Estate Agency Relationships" form that identified *Coldwell* as the agent of both the buyer and seller; Cortazzo signed for the seller's agent and Namba signed for the buyer's agent. (1AA 154.) Horiike also signed a "Disclosure And Consent For Representation Of More Than One Buyer Or Seller" form that identified the potential dual agent as Coldwell (1AA 159), and a statutorily-required "Disclosure Regarding Real Estate Agency Relationships" form that identified Coldwell as the agent. (1AA 156; Civ. Code, § 2079.16.)

### D. The Buyer Sues Coldwell And The Seller's Salesperson (But Not His Own Salesperson), Claiming The Seller's Salesperson Falsely Represented The Home's Square Footage.

Several years after purchasing the property, buyer Horiike filed a complaint against Coldwell and Cortazzo for intentional and negligent misrepresentation, breach of fiduciary duty, unfair business practices in violation of Business and Professions Code section 17200, and false advertising in violation of Business and Professions Code section 17500. (Opn. 5.) He later added a claim for intentional concealment. (*Ibid.*)

Each claim rested on the same allegations: Cortazzo had misrepresented the home's actual square footage, causing Horiike to pay a higher price than warranted. (Opn. 5; 1AA 1-12.) Horiike claimed no wrongdoing by his own salesperson, Namba. (Opn. 5.)

### E. The Trial Court Holds That The Seller's Salesperson Owed No Fiduciary Duty To The Buyer; It Grants Nonsuit To The Seller's Salesperson On The Fiduciary-Duty Claim And Instructs The Jury That Coldwell Cannot Be Liable For Breach Of Fiduciary Duty Based On That Salesperson's Acts.

The trial court concluded that Cortazzo owed no fiduciary duty to the buyer. (Opn. 2, 5.) It therefore granted nonsuit to Cortazzo on the claim for breach of fiduciary duty. (*Ibid.*)

Buyer Horiike stipulated that he was not seeking recovery based on any acts of his own salesperson, Namba. (Opn. 5.) The court therefore instructed the jury that Coldwell could be liable for breach of fiduciary duty only if the jury found that some representative of Coldwell other than Cortazzo and Namba breached a fiduciary duty to the buyer. (*Ibid.*)

### F. The Jury Finds For The Defendants On All Submitted Claims; The Court Enters A Defense Judgment.

By special verdict, the jury ruled in favor of Coldwell and Cortazzo on the claims for intentional and negligent misrepresentation, intentional

concealment, and breach of fiduciary duty (regarding Coldwell only). (Opn. 5.)

It found under the negligent misrepresentation count that Cortazzo made a misrepresentation of material fact but that he "honestly believed, and had reasonable grounds for believing, the representation was true when he made it." (Opn. 5.) The jury also "found no concealment, because Cortazzo did not intentionally fail to disclose an important or material fact that Horiike did not know and could not reasonably have discovered." (Opn. 5-6.)

The parties had stipulated that the trial court could rule on the two Business and Professions Code claims after the jury trial. (Opn. 5.) The court concluded that "[t]he jury's findings of no actionable misrepresentation or concealment" mandated judgment for the defendants on those claims. (2AA 239:10-12.) It therefore entered judgment in favor of Coldwell and Cortazzo. (Opn. 6.)

### G. In A First-Impression Published Decision, The Court Of Appeal Reverses The Judgment, Holding Civil Code Section 2079.13, Subdivision (b), Makes The Seller's Salesperson A Fiduciary Of The Buyer.

The buyer appealed, arguing the trial court erred in finding Cortazzo owed no fiduciary duty to the buyer. (Opn. 2, 6.) The Court of Appeal agreed in a published decision, reversing the judgment and remanding for a new trial. (Opn. 2.)

The published opinion holds, as an issue of first impression, that "[w]hen a broker is the dual agent of both the buyer and the seller in a real property transaction, the salespersons acting under the broker have the same fiduciary duty to the buyer and the seller as the broker." (Opn. 2.) It therefore concluded that Cortazzo, the seller's salesperson, owed the buyer the same fiduciary duty that Coldwell (and the buyer's salesperson) owed the buyer. (Opn. 7-8.)

The opinion does not rely on case law or any legal doctrine, such as the law of agency, respondeat superior, or vicarious liability.[2] Instead, the opinion relies on statutory construction, concluding "[t]he duties of brokers and salespersons in real property transactions are regulated by a comprehensive statutory scheme" set forth in Civil Code section 2079 et seq. (Opn. 7.) Ultimately, the holding rests on the court's interpretation of one statute, Civil Code section 2079.13, subdivision (b). (Opn 7-8.) That statute defines the term "associate licensee" for purposes of sections 2079.14 to 2079.24:

> "Associate licensee" means a person who is licensed as a real estate broker or salesperson . . . and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee.
>
> The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent.

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[2] The opinion quotes isolated treatise language about a misunderstanding by salespersons. (Opn. 8, quoting 2 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 3:12, pp. 68-69.) But the treatise cites no authority and the comment is unclear. (See *ibid.*)

> When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.

(Civ. Code, § 2079.13, subd. (b).)

The opinion concludes that because Cortazzo (the seller's salesperson) and Namba (the buyer's salesperson) were associate licensees of Coldwell, Coldwell was a "dual agent" of the buyer and seller, and Coldwell thus owed fiduciary duties to both the buyer and seller. (Opn. 7-8.)[3] The opinion then holds that Cortazzo, by operation of section 2079.13, subdivision (b), owed not just the seller a fiduciary duty, but also *the buyer*:

> Under Civil Code section 2079.13, subdivision (b), the duty that [the seller's salesperson] Cortazzo owed to any principal, or to any buyer who was not a principal, was equivalent to the duty owed to that party by [broker Coldwell]. [Coldwell] owed a fiduciary duty to [buyer] Horiike, and therefore, Cortazzo owed a fiduciary duty to Horiike.

(Opn. 8.)

The trial court, the opinion holds, therefore erred in granting nonsuit to Cortazzo on the fiduciary-duty claim and in instructing the jury that Coldwell could not be liable for breach of fiduciary duty based on his acts.

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[3] Under the statutes, an "'[a]gent' means a person acting under provisions of [the general agency statutes] in a real property transaction, and includes a person who is licensed as a real estate broker . . . and under whose license a listing is executed or an offer to purchase is obtained." (Civ. Code, § 2079.13, subd. (a).)

In turn, a "'[d]ual agent' means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction." (*Id.*, subd. (d).)

Under California common law, dual agents have fiduciary duties to both clients—the buyer and seller. (Opn. 7.)

(Opn. 8.) The opinion then relates the broad scope of Cortazzo's purported fiduciary duties to his non-client, the buyer:

> "'[A] broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. [Citations.] 'The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information.'"

(Opn. 9, citation omitted.)

The opinion concludes that even though—as the jury properly found on the non-fiduciary-duty-related claims—Cortazzo honestly believed, and had reasonable grounds for believing, his square-footage representations to the buyer and he lacked fraudulent intent and did not intentionally conceal anything, he still could be potentially liable for breach of fiduciary duty to the buyer. (Opn. 9-10.)

Defendants moved for rehearing solely on the ground that the remand instructions were unclear. The petition was denied.

## WHY REVIEW SHOULD BE GRANTED

## I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE OPINION'S NEWFOUND IMPOSITION OF FIDUCIARY DUTIES IMPLICATES IMPORTANT STATEWIDE PUBLIC POLICY ISSUES THAT IMPACT ALL CALIFORNIA BUYERS AND SELLERS OF RESIDENTIAL PROPERTY AND THEIR AGENTS.

### A. Residential Sales Frequently Have Different Salespersons From The Same Brokerage On Opposite Sides.

There are two types of dual agency in the real estate industry: (1) an *individual* represents both the buyer and the seller in the same transaction; and (2) different salespersons from the same real estate brokerage *firm* represent the buyer and the seller, i.e, "intra-firm transactions" where the firm itself is a dual agent but there are separate, independent salespersons—the context here. (Pendergrass, *The Real Estate Consumer's Agency And Disclosure Act: The Case Against Dual Agency* (1996) 48 Ala. L. Rev. 277, 279 fn. 8 ["*Agency/Disclosure Act*"].)

Intra-firm transactions are common; in some brokerage firms, they comprise over 50% of the transactions. (Szto, *Dual Real Estate Agents And The Double Duty Of Loyalty* (2002) 41 Real Est. L.J. 22, 43-44 ["*Dual Agents*"].) There are an estimated thirty-two national and regional real estate franchise brands operating across the country; over half of the

nation's realtors work under a franchise banner. (Sichelman, *Berkshire Hathaway To Shake Up Real Estate Franchise Landscape,* September 20, 2013, Los Angeles Times <latimes.com/business/ realestate/la-fi-lew-20130922,0,907149story>.)

By some estimates, the five largest firms alone (RE/MAX, Coldwell Banker, Keller Williams, Century 21 and Prudential) control almost 31% of the U.S market in terms of transaction sides (buyer or seller). (RE/MAX LLC, *Press Release, Study Confirms: RE/MAX Sells More Real Estate* (July 25, 2013) <http://files.a2.remax.com/content/blog/ market_share_study_july_2013.pdf> [as of May 1, 2014]>.)

Among that top five, the number of associate licensees and offices nationwide is gargantuan (2011 figures): Century 21: 119,206 associates among 7,864 offices; RE/MAX: 89,628 licensees among 6,259 offices; Coldwell: 87,203 associates among 3,202 offices; Keller Williams: 77,672 licensees among 701 offices; and Prudential: 55,000 associates among 1,700 offices. (*Comparison of Residential Real Estate Franchises* (July/Aug. 2011) REALTOR, at pp. 28-29 <http://realtormag. realtor.org/sites/realtormag.realtor.org/files/ 2011_franchise_report_0.pdf> [as of May 15, 2014].)

Accordingly, intra-firm transactions are a recurring, important issue across California and the entire country.

### B. Prior To The Opinion, Salespersons In Intra-Firm Transactions Already Owed Substantial Non-Fiduciary Duties To Non-Principal Buyers Or Sellers.

In any real estate transaction, the seller's salesperson and the buyer's salesperson owe their respective client a fiduciary duty "of utmost care, integrity, honesty, and loyalty." (Civ. Code, § 2079.16; accord, *Lekko v. Cornerstone Building Inspection Service* (2001) 86 Cal.App.4th 1109, 1116.) Salespersons generally owe a fiduciary duty only to their client (their principal in the agency relationship) and do not owe fiduciary duties to the buyer or seller who is not their principal. (*Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1528 (*Holmes*); *Michel v. Palos Verdes Network Group, Inc.* (2007) 156 Cal.App.4th 756, 762 (*Michel*).)

Salespersons, however, also owe *non*-fiduciary duties to the buyer or seller who is not their principal. Those duties include the "[d]iligent exercise of reasonable skill and care in performance of the [salesperson's] duties," a duty "of honest and fair dealing and good faith," and a "duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties." (Civ. Code, § 2079.16; accord, *Holmes*, *supra*, 188 Cal.App.4th at pp. 1523-1524, 1528; Civ. Code, § 2079, subd. (a) [salespersons representing or cooperating with sellers owe prospective buyers duty "to conduct a reasonably competent and diligent visual inspection of the property" and disclose "all facts materially affecting

the value or desirability of that property that an investigation would reveal"].)

This balance—salespersons owing fiduciary duties to their client but owing non-fiduciary duties of honesty and fairness to the buyer or seller on the other side—furthers California public policy. A party has the absolute fidelity of its own salesperson and duties of honesty and fairness from any other salesperson. The opinion scuttles that balance in intra-firm transactions by transforming that exclusive salesperson into a dual agent owing fiduciary duties to both sides.

This is a seismic shift in California law. The fiduciary duties that salespersons owe clients fundamentally differ from the non-fiduciary duties owed non-principals. (*Michel*, *supra*, 156 Cal.App.4th at p. 762.) As shown below, this seismic shift is a public-policy disaster.

### C. The Opinion's Newly-Imposed Fiduciary Duties Severely Harm The Interests And Expectations Of Buyers And Sellers.

The opinion's revolutionary holding contravenes the interests and expectations of any prospective buyer or seller of a California residence.

Sellers and buyers depend upon an individual salesperson who owes them the fiduciary duty of undivided loyalty. Each party to a transaction benefits by having a representative exclusively in that party's corner who can bargain on that client's behalf with undiluted loyalty. In an intra-firm transaction, the brokerage firm achieves that goal if separate salespersons

independently represent the buyer and the seller and each is designated the fiduciary of that party only.

But the opinion destroys that ability by making each salesperson in an intra-firm transaction a dual fiduciary. This leaves consumers with "divided loyalty and nonexclusive representation" since the salespersons owe the same duties to both parties. (*Agency/Disclosure Act*, *supra*, 48 Ala. L. Rev. at p. 295.) It deprives consumers of their choice of having an exclusive agent owing undivided loyalty.

The opinion also destroys the ability of buyers and sellers in intra-firm transactions to share sensitive information with their salesperson. By transforming each salesperson into the fiduciary of both the buyer and seller, the opinion requires each salesperson to disclose to *both parties* "all information it possesses that is material to [each] principal's interests." (*Michel*, *supra*, 156 Cal.App.4th at p. 762.) Where a dual agent "knows confidential information regarding one principal that is information material to the second principal, there is no common law protection against the duty to disclose this information to the second principal." (2 Miller & Starr, *supra*, Agency, § 3:16, p. 83.) "An agent who represents *both principals* must make a full and complete disclosure of all material facts to *both* parties regarding any matter that would affect *either* principal's decision to buy, and the price and terms of such purchase, even though the facts relate to confidential information of the other party." (*Ibid.*, emphasis in original, fn. omitted.)

Moreover, a fiduciary's disclosure duty is not limited to previously-known information. For example, the opinion follows case law that fiduciaries must "'perform the necessary *research and investigation* in order to know those important matters that will affect the principal's decision'" and must "'*counsel and advise* the principal regarding the propriety and ramifications of the decision.'" (Opn. 9, citation omitted, emphasis added.) Thus, not only will the opinion force salespersons in intra-firm transactions to disclose known information to the other side, each salesperson must arguably investigate what the other salesperson knows or should know.

The public-policy impact is particularly severe because dual agents must disclose everything other than the buyer's or the seller's ultimate position on price. (Civ. Code, § 2079.21 ["A dual agent shall not disclose to the buyer that the seller is willing to sell the property at a price less than the listing price, without the express written consent of the seller. A dual agent shall not disclose to the seller that the buyer is willing to pay a price greater than the offering price, without the express written consent of the buyer."]; *ibid.* ["This section does not alter in any way the duty or responsibility of a dual agent to any principal with respect to confidential information *other than price*" (emphasis added)].)

The opinion thus creates a nightmare for buyers and sellers. Most transactions involve sensitive non-price information that buyers and sellers want their salesperson to keep confidential. Salespersons almost always possess information about their client's motivations and interests that can harm bargaining leverage if disclosed to the other side. Yet, the

opinion—by transforming each salesperson into a fiduciary of both parties—forces salespersons to make disclosures to the other side that will severely harm the principal-client.

For example, seller's salespersons in intra-firm transactions will have to harm the seller's interests by disclosing to the buyer that:

- the seller is highly motivated to sell quickly (e.g., because it already purchased another home or the seller needs to raise cash immediately because of a pending divorce);
- a comparable home is selling nearby for substantially less;
- the salesperson believes the property is worth less than the list price;
- the seller has financial difficulties;
- the seller is willing to throw in extras (e.g., furnishings) or make concessions on non-price terms (e.g., escrow periods, financing terms, contingencies, cost allocations).

Buyers and their salespersons fare no better. The opinion will force a buyer's salesperson to disclose to the seller that:

- The buyer needs to close quickly (e.g., to consummate an exchange sale under 26 U.S.C. § 1031);
- the buyer prefers the home over others in the neighborhood;
- the buyer is amenable to non-price concessions;
- the buyer has financial difficulties;
- the salesperson believes the list price is too low.

This topsy-turvy world flatly contradicts the expectations of California consumers. When an individual (not a brokerage firm) is the dual agent, the parties can easily perceive the potential risk—the risk of sharing sensitive information is obvious. But intra-firm transactions fundamentally differ. Even if Horiike and the seller understood that Coldwell was a dual agent and the deep pocket ultimately responsible for any fiduciary default by their salesperson, Horiike did not perceive the seller's salesperson Cortazzo to be his agent (indeed, they met only once and did not speak the same language). Nor did the seller perceive Namba to be its agent.

Worse, given the nature of real estate transactions, the opinion's transformation of salespersons from exclusive agents into dual fiduciaries occurs dangerously midstream. When a prospective buyer or seller retains a salesperson, no one knows who will end up on the other side. Yet, under the opinion, if the other side ends up having an agent from the same brokerage firm, the exclusive agency transforms into a dual agency and the parties lose protection of any confidential non-price information shared with their salesperson. The buyer's or seller's only options are to: (1) agree to this nightmare; (2) forgo the sale or purchase they wanted to consummate; or (3) fire their salesperson and retain one from a different brokerage, which would force the seller to pay two listing commissions and force the buyer to pay out of pocket for a new salesperson with the original one being paid from the purchase proceeds.

The opinion contravenes the expectations, interests and needs of California buyers and sellers.

### D. The Opinion Exposes Brokerage Firms And Their Salespersons To Conflicting Duties That Will Engender Chaos And Increased Litigation/Liability Exposure.

The opinion is not just a nightmare for buyers and sellers. It creates chaos for brokerage firms and their salespersons, which will further harm consumers.

A fiduciary's failure to disclose any material fact that might affect "the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud." (*Michel, supra*, 156 Cal.App.4th at p. 763, internal quotation marks omitted.) Thus, the opinion leaves salespersons in intra-firm transactions in the situation of owing inherently conflicting duties where they risk being sued no matter what they do. If a seller's salesperson fails to disclose to the buyer a material fact about the seller, the buyer might sue. But if the salesperson discloses the material fact, the seller might sue. *Compliance* with fiduciary duties to one side will frequently constitute *breach* of fiduciary duties to the other. Salespersons are "damned if they do, and damned if they don't."

Other compliance issues abound. If both salespersons in intra-firm transactions are now fiduciaries of both parties, each salesperson must *research and investigate* to determine the important matters that will affect either party's decision and provide *counsel* to both parties. So, if Cortazzo

was Horiike's fiduciary, as the opinion holds, Cortazzo needed to determine Horiike's needs and provide him counsel—even though they had no prior relationship and do not speak the same language. The opinion forces salespersons into fiduciary relationships with parties they never chose to represent. To avoid being sued for breach of fiduciary duty, each salesperson must essentially duplicate the other's services to someone who may be a complete stranger. Salespersons face double the fiduciary duty and double the liability risk, all against their own will—and, as explained below, utterly contrary to fundamental principles of agency law.

The opinion also subjects salespersons to duties that are virtually impossible to follow without violating ethical rules. Salespersons are not supposed to directly contact individuals represented by another salesperson absent consent, or provide substantive services to parties to exclusive representation agreements. (See Nat. Assn. of Realtors, Code of Ethics and Standards of Practice (Jan. 2014) Standard of Practice 16-13.) Yet the opinion will force salespersons to engage in such communications and services to avoid being sued for breach of fiduciary duty. And yet by doing so they risk suit for breaching ethical duties.

This chaos will trigger an explosion in litigation, as lawyers seize advantage of these new conflicting duties. The increased litigation and liability exposure will trigger increases in insurance premiums. Transaction costs inevitably will rise—all to the detriment of California consumers. And some brokerage firms and salespersons may choose to forsake intra-firm transactions altogether, which would further harm California

consumers. Reducing the availability of intra-firm transactions would mean "buyers are limited in their market choices because they have fewer homes to choose from, and sellers are limited in their market exposure because their home is shown to fewer buyers, which translates into lower selling prices." (*Agency/Disclosure Act, supra*, 48 Ala. L. Rev. at p. 295.)

The opinion's public-policy impact is not just troubling—it is the exact *opposite* of what sound public policy would mandate.

### E. Public Policy Is Best Served In Intra-Firm Transactions By The Current System Of Separate Salespersons Exclusively Representing The Buyer Or Seller And Owing Fiduciary Duties Solely To That Client.

From a public-policy standpoint, the current regime—the one followed by the trial court—is plainly the soundest approach: Where two different salespersons from the same brokerage firm represent the buyer and the seller, each owes a fiduciary duty exclusively to his or her respective client; and the brokerage firm owes a dual fiduciary duty to ensure the salespersons do not breach their duties and to provide a deep pocket in the event of a breach.

This approach tracks standard agency law and how brokerage firms always operated in California before this opinion. It is also the standard view of how intra-firm transactions work:

> [B]ecause many brokerage firms dominate their marketplace with hundreds of listings, consumers cannot avoid using the services of licensees within the same brokerage. A seller or buyer may severely

> limit their choices of potential buyers or homes if they refuse dual agency in this scenario. In this situation *each agent is supposed to be the fiduciary of a different principal and the brokerage erects a 'Chinese wall' to protect confidential information between the two agents.*

(*Dual Agents*, *supra*, 41 Real Est. L.J. at p. 43, emphasis added, fn. omitted.)

Indeed, across the country, twenty-eight states have enacted legislation that expressly accommodates intra-firm transactions by providing for separate licensees to represent the buyer and the seller and owe fiduciary duties solely as to their respective client.[4] As explained below, although California's statutes do not expressly so provide, the Court of Appeal erred in interpreting those statutes as *precluding* this common-

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[4] See **Alaska**: Alaska Stat. §§ 08.88.600(d), 08.88.640(a), 08.88.640(b); **Colorado**: Colo. Rev. Stat. §§ 12-61-803(6)(a)-(c); **Connecticut**: Conn. Gen. Stat. § 20-325i; **Delaware**: Del. Code Ann. tit. 24, §§ 2933(c)(1), 2936(a); **Georgia**: Ga. Ann. Code §§ 10-6A-13(a)-(b); **Idaho**: Idaho Code §§ 54-2084(2)(d), 54-2088; **Illinois**: 225 Ill. Comp. Stat. 454 / 15-50; **Indiana**: Ind. Code §§ 25-34.1-10-6.5, 25-34.1-10-7.8, 25-34.1-10-12.5(a); **Iowa**: Iowa Code § 543B.59(1)-(2); **Kansas**: Kan. Stat. Ann. §§ 58-30,109(b)(1), 58-30,109(b)(4), 58-30,113; **Kentucky**: Ky. Rev. Stat. §§ 324.010(4), 324.121(1), 324.121(2); **Maine**: 32 Me. Rev. Stat. §§ 13271, 13278; **Massachusetts**: Mass. Gen. Laws Ann., ch. 112, § 87aaa 3/4, subd. (c); **Michigan**: Mich. Comp. Laws §§ 2517(11)(d), 2517(7), 2517(8); **Nebraska**: Neb. Rev. Stat. §§ 76-2413, 76-2427; **Nevada**: Nev. Rev. Stat. §§ 645.253, 645.252(d)(1); **New Hampshire**: N.H. Rev. Stat. §§ 331-A:25-e, 331-A:2, subd. (I-b.), 331-A:2, subd. (IV-a.); **New Mexico**: N.M. Code R. §§ 16.61.1.7(R), 16.61.19.10(A)(3); **North Carolina**: 21 N.C. Admin Code 58A.0104(i)-(l); **North Dakota**: N.D. Cent. Code §§ 43.23-12.3, 43.23-06.1; **Ohio**: Ohio Rev. Code §§ 4735.51, 4735.53(B), 4735.53(C), 4735.70; **Oregon**: Or. Rev. Stat. §§ 696.815(4), 696.815(5); **Pennsylvania**: 63 Penn. Stat. §§ 455.606e(a)(1), 455.606e(b)(1); **Rhode Island**: R.I. Gen. Laws § 5-20.6-5(b)-(f); **South Carolina**: S.C. Code §§ 40-57-137(P)(1), 40-57-137(P)(2), 40-57-137(P)(4); **Tennessee**: Tenn. Code. § 62-13-406(a); **Virginia**: Va. Ann. Code §§ 54.1-2139.1, 54.1-2139.1(A); **Washington**: R.C.W. § 18.86.020(2).

sense approach—the only approach that comports with settled agency principles.

## II. THE COURT SHOULD GRANT REVIEW TO RESOLVE IMPORTANT QUESTIONS REGARDING DUAL AGENCY AND THE PROPER CONSTRUCTION OF CIVIL CODE SECTION 2079.13.

As shown below, the opinion radically diverges from settled agency law: It imputes the broker's duties as principal downward to the salesperson as the broker's agent *and* it forces a fiduciary relationship on salespersons and their clients without their consent. These fundamental departures from settled law create important public policy issues in their own right. But they also confirm that the opinion raises important issues of statutory interpretation. Had the Legislature intended the sea change that the opinion adopts, it certainly would have done so in crystal clear fashion, rather than the contorted fashion found by the Court of Appeal. In point of fact, the legislative history makes clear that in enacting this legislation the Legislature intended to *preserve*, not change, existing agency law. These important agency-law and statutory-interpretation issues cry out for review by this Court.

### A. The Opinion Diverges From Settled Agency Law By Imputing A Principal's Duties Downward To Its Agents.

The opinion's holding that Coldwell's duties to the buyer and the seller can be imputed downward to its salespersons, and each salesperson therefore is a fiduciary of both parties, contravenes settled agency law.

Under long-established agency-law principles, imputation flows one way only—from *agent to principal*, not from principal to agent. All liabilities and duties that accrue to an agent (here, salespersons Namba and Cortazzo) accrue equally to the principal (here, Coldwell):

> An agent represents the principal for all purposes within the scope of the agent's actual or ostensible authority. Within that limit, all rights and liabilities that accrue to the agent from transactions the agent enters into on his or her own account accrue to the principal.

(3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 130, p. 175.) The Legislature codified this fundamental rule over 140 years ago, in Civil Code section 2330.

There is no reciprocal doctrine that imputes a principal's liabilities onto its agents by operation of law. An agent is not liable for the principal's nonperformance or breaches of duties, contractual or otherwise: *"The relationship of principal and agent works the other way* – the principal is bound by the acts of the agent, if the agency covers the act in question." (*Ebner v. Sheehan* (1950) 99 Cal.App.2d 860, 863-864, emphasis added; accord *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 929.)

Just as agents are not responsible for the *duties* imposed upon principals, agents are not responsible for their principal's *breaches* of those

duties. There is no doctrine of respondeat *inferior*: "The [real estate] agent is only liable to third persons for his or her own wrongful acts or omissions. While a principal may be vicariously liable for the wrongful acts of an agent, . . . absent fault, an agent cannot be vicariously liable for the wrongful acts of the principal." (2 Miller & Starr, Cal. Real Estate, *supra*, § 3:36 at p. 212; accord Rest.3d Agency, § 7.01, com. d. ["An agent is not subject to liability for torts committed by the agent's principal that do not implicate the agent's own conduct; there is no principle of 'respondeat inferior."].)

For example, in *Moser v. Bertram* (1993) 115 N.M. 766 [858 P.2d 854], the New Mexico Supreme Court held (under standard agency law and contrary to the opinion here) that where the seller's salesperson and the buyer's salesperson work for the same real estate brokerage firm, the seller's salesperson does *not* owe a fiduciary duty to the prospective buyer. The Supreme Court rejected the buyer's argument that "'all salespeople employed by a given broker must be bound by all of the fiduciary relationships of that broker'"; it recognized that "liability simply does not flow between coagents" and that while each salesperson's fiduciary duty to its client will extend to the broker, the salespersons are not liable for the other salesperson's fiduciary duty that may be imputed to the broker. (115 N.M. at pp. 767-768 [858 P.2d at pp. 855-856].)

Here, under standard agency-law principles, the fiduciary duties that Namba owed buyer Horiike and that Cortazzo owed the seller could be imputed to Coldwell as principal, and Coldwell's deep pocket could be

liable for Namba's and Cortazzo's respective breaches; but the fiduciary duties that Namba and Cortazzo each owed their respective client would not flow up to Coldwell as principal and then down to the other salesperson. The opinion contravenes settled agency law.

### B. The Opinion Further Diverges From Settled Agency Law By Forcing Salespersons To Become Fiduciaries Of Individuals They Never Agreed To Represent.

The opinion also diverges from settled agency law in another key respect: It forces salespersons, buyers, and sellers into fiduciary relationships without their consent. Cortazzo and Horiike never agreed to any agency relationship, nor did Namba and the seller. But the opinion imposes one by operation of law.

Under settled agency law, a real estate agent "cannot be burdened with [fiduciary] obligations against his or her will." (2 Miller & Starr, Cal. Real Estate, *supra*, § 3.5, at p. 16.) The creation of an agency relationship requires *consent*: "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, *and the agent manifests assent or otherwise consents so to act.*" (Rest.3d Agency, § 1.01, emphasis added; accord, *Naify v. Pacific Indemnity* (1938) 11 Cal.2d 5, 12 ["actual agency must rest on agreement or consent"]; *Rental Housing Owners Assoc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 91 ["Absent mutual consent . . . there can be no agency"].)

Under standard agency law, Cortazzo could not be a fiduciary of Horiike because he and Horiike never agreed to an agency relationship; for the same reason, Namba could not be the seller's fiduciary. The opinion, however, *forces* Cortazzo and Namba to become agents of a non-principal without their consent and *forces* the buyer and the seller to relinquish their choice of having an exclusive agent. For this additional reason, the opinion flouts settled agency law and again infringes on California public policy.

### C. The Opinion Presents Important Issues Of Statutory Construction On Which This Court Is The Final Arbiter.

The opinion does not discuss agency law. Instead, the holding that the two salespersons owe dual fiduciary duties rests on the court's construction of Civil Code section 2079 et seq., in particular section 2079.13, subdivision (b). As the final arbiter of statutory interpretation, only this Court can resolve this issue. As shown below, there are multiple, overwhelming reasons for this Court to conclude that the opinion's interpretation is dead wrong.

#### 1. The plain language and legislative history of the pertinent statutes demonstrate that the Legislature was not addressing intra-firm transactions.

Civil Code section 2079.13, subsection (b), is part of a statute that merely defines terms for purposes of Civil Code sections 2079.14 to 2079.24. These statutes were originally enacted by a 1986 bill that became operative in 1988. (See 10A West's Ann. Civ. Code (Supp. 2014) §§ 2373-

2382, historical and statutory notes.) In 1995, the statutes were repealed and re-codified—without change—at their current location. (See 10 West's Ann. Civ. Code (2010) §§ 2079.14-2079.24, historical and statutory notes.) Accordingly, the 1986 bill's legislative history is the pertinent one. Petitioners are submitting that history through a concurrent request for judicial notice ("RJN").

The legislative history reveals the following:

- The Legislature and the bill's sponsor (the California Association of Realtors) enacted the statutes to ensure that real estate agents disclosed to prospective buyers and sellers the *existing* agency rules, not to change existing law by expanding or diminishing the duties of agents, brokers or licensees. (RJN 45, 86 ["the bill is not intended to create any new liability"], RJN 53 [the bill "attempts to enunciate existing law"]; RJN 54 [the bill "does not mandate sellers, buyers or real estate brokers to accept or function in any particular agency relationship, but maintains the options now available and the constraints now applicable under California law (primarily evolved by the courts)"].)

- The bill's focus was to ensure that buyers and sellers received informational disclosures about the types of agency relationships to reduce confusion and to minimize the rescission of real estate sales based on misunderstandings regarding whom an agent represented. (RJN 44-45, 52-54, 57-62, 81-86, 96-98.) Listing agreements often made any agent a seller sub-agent, which resulted in buyers inadvertently sharing confidential information with a seller's agent or a dual agent. (RJN 62, 82, 97.)

- There was no focus or discussion on intra-firm transactions.

Moreover, consistent with this legislative history, the enacted statutes do not address intra-firm transactions. They focus only on an individual *person* acting as agent. Section 2079.13, subdivision (a), defines an "agent" to be "a *person* acting under [the general agency statutes] in a real property transaction, and includes *a person* who is licensed as a real estate broker . . . " (Emphasis added.) Subdivision (b), in turn, provides that "[t]he agent in the real property transaction bears responsibility for *his or her* associate licensees who perform as agents of the agent." (Emphasis added.)

Thus, when subdivision (d) defines a "dual agent" as "an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer," it is referring to a *person* representing both sides, not a brokerage firm that has separate salespersons independently representing each side. The intra-firm transactions at issue here were not on the Legislature's radar. (See *Rivkin v. Century 21 Teran Realty LLC* (2008) 887 N.E.2d 1113, 1118-1119 [858 N.Y.S.2d 55, 60-61] [concluding that when the New York legislature adopted a particular real estate disclosure requirement, its concern was consumer confusion over whether an *individual* broker or salesperson was acting for the seller, the buyer, or both, not whether a brokerage *firm* might be representing multiple parties—the disclosure statute speaks "in terms of an 'agent,' defined as 'a *person* who is licensed as a real estate broker or real estate sales associate," instead of

saying "any person, firm, limited liability company or corporation" (emphasis in original)].)

The opinion ignores this distinction. It re-writes and distorts the statute by stating that "[u]nder this scheme, an 'agent' *is a licensed real estate broker* 'under whose license a listing is executed or an offer to purchase is obtained.'" (Opn. 7, emphasis added.) That's not what the statute says. Under the statutes, an agent is a *person*. The 1986 bill was not about intra-firm transactions.

**2. The only logical construction of Civil Code section 2079.13, subdivision (b)—backed by the language, legislative history, settled agency law and public policy—is that the statute codifies that a principal-agent relationship exists between a broker and associate licensees, and therefore a licensee's acts/duties are those of the broker.**

The opinion compounds the confusion by construing section 2079.13, subdivision (b), as meaning that "the duty that Cortazzo owed to any principal, or to any buyer who was not a principal, was equivalent to the duty owed to that party by [Coldwell]" and therefore "Cortazzo owed a fiduciary duty to Horiike" because Coldwell "owed a fiduciary duty to Horiike." (Opn. 8.) Even ignoring (as the opinion does) that subdivision (b)'s reference to "agent" actually refers to a *person*, something Coldwell is not, the opinion's construction is illogical and contrary to the only reasonable reading of the statute.

Subdivision (b)'s last sentence is not artfully written. But the opinion's construction is illogical and renders portions nonsensical. The critical sentence in the statute states: "*When* an associate licensee owes *a duty* to any principal, *or to any buyer or seller who is not a principal*, in a real property transaction, *that duty* is equivalent to the duty owed to *that party* by the broker for whom the associate licensee functions." (Civ. Code, § 2079.13, subd. (b), emphasis added.) Fiduciary duties are not owed to non-principals; as explained previously, salespersons only owe *non*-fiduciary duties of honesty and fair dealing to buyers/sellers who are not principals. A broker (like Coldwell) representing both the buyer and the seller, however, owes dual fiduciary duties. The opinion thus reads the statute as imputing Coldwell's dual fiduciary duties downward to both salespersons.

But that means, in the context of intra-firm transactions where separate salespersons represent the buyer and the seller, that the statute would effectively read as follows:

> When an associate licensee owes a *non*-fiduciary duty to the buyer or seller who is not a principal, *that non*-fiduciary duty is *equivalent* to the *fiduciary* duty owed by the broker to that party.

If the Legislature had meant to *change* the type of duty owed by the associate licensee by imputing the broker's duty downward, its use of the word "equivalent" was illogical. Equivalent means that the duties on both sides of the equation are equal, not that one duty is transformed into a different one. Nor does it make sense to assume that the Legislature intended, through such ambiguous terms, to diverge radically from settled

agency law by *forcing* associate licensees to become fiduciaries of a non-principal buyer/seller without anyone's consent and to impute a broker-principal's duties *downward* to its salesperson-agents.

Instead, the only reasonable reading of the statute is that the Legislature merely intended to confirm that associate licensees and their brokers *are in an agency relationship*, and therefore whatever duty the licensee owes to a particular buyer or seller is imputed to the broker. The statutory language, read as a whole, supports that construction. The sentence that immediately precedes the "equivalent duty" sentence states: "The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent." (Civ. Code, § 2079.13, subd. (b).) In this light, the next sentence logically reads that the broker—as the principal in the agency relationship with its associate licensees—is responsible for the licensee's duties and acts. That interpretation, unlike the opinion's construction, comports with settled agency law *and* public policy.

It also comports with the legislative history: The Legislature stated, in enacting the 1986 bill, that it intended to "*[m]ake clear* that associate real estate licensees act *as agents of brokers under whom they are licensed*, and who, in turn, are agents of buyers, sellers or buyers and sellers in residential real property transactions covered by this act." (10A West's Ann. Civ Code (Supp. 2014) Historical and Statutory Notes to former § 2373, emphasis added.)

And, as noted above, the legislative history also shows that the Legislature intended to require disclosures of *existing* agency law, not to diverge from it by imposing new duties. At the time of the 1986 bill, real estate salespersons were considered agents of brokers, making their duties and acts—in legal effect—the duties and acts of the brokers. (See, e.g, *Resnik v. Anderson & Miles* (1980) 109 Cal.App.3d 569, 572-573 [a real estate salesperson "is strictly the agent of the broker under whom he is licensed"; "a principal-agent relationship" exists]; *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 63 [salesperson was an agent of her employing broker and thus "her acts as agent were, in legal effect, his acts as principal"].)

Likewise, under section 2079.13, subdivision (b), the duties of the associate licensees are, in legal effect, the duties of the broker. The opinion's contorted construction finds no support in case law, the legislative history, agency principles or public policy.

## III. CONCLUSION.

Absent review, the opinion's deleterious impact will be immediate. The opinion will be binding in all California trial courts, forcing brokerage firms and salespersons to comply with its mandate or else risk inordinate liability exposure.

This case tees up the issues in a particularly straightforward fashion. The plaintiff-buyer never sued his own salesperson (who undeniably owed a fiduciary duty) and stipulated that his salesperson did nothing wrong. The

seller's salesperson—now deemed to owe fiduciary duties to the buyer—only met the buyer once, had virtually zero communications with him, and does not even speak the same language as the buyer. And the two salespersons worked for different offices and never met before this transaction.

This case presents the perfect vehicle for resolving the important public-policy and statutory-interpretation issues presented by this petition. Review should be granted.

Dated: May 19, 2014 Respectfully submitted,

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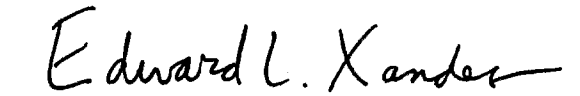
By: 
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## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to California Rules of Court, rule 8.504(d)(1), that the **PETITION FOR REVIEW** contains **8,358** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: May 19, 2014

Edward L. Xanders

## PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On May 19, 2014, I served the foregoing document described as: **PETITION FOR REVIEW** on the parties in this action by serving:

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**[Court of Appeal Case No. B 246606]**

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on May 19, 2014, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Anita F. Cole

Filed 4/9/14

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

| | |
|---|---|
| HIROSHI HORIIKE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY et al.,<br><br>Defendants and Respondents. | B246606<br><br>(Los Angeles County Super. Ct. No. SC110477) |

APPEAL from a judgment of the Superior Court of Los Angeles County, John H. Reid, Judge. Reversed and remanded.

Victor N. Pippins and David W. Macey for Plaintiff and Appellant.

Klinedinst PC and Neil Gunny for Defendants and Respondents.

A broker represented both the buyer and the seller in a real property transaction through two different salespersons. The buyer brought several claims against the broker and the salesperson who listed the property for sale, including breach of fiduciary duty. The trial court granted a nonsuit on the claim for breach of fiduciary duty against the salesperson on the ground that the salesperson who listed the property did not have a fiduciary duty to the buyer. The court also instructed the jury that the broker had no liability for breach of fiduciary duty based on the salesperson's acts. The jury returned a verdict in favor of the defense on the remaining causes of action.

The buyer contends that the salesperson had a fiduciary duty equivalent to the duty owed by the broker, and the trial court incorrectly granted the nonsuit and erroneously instructed the jury. We agree. When a broker is the dual agent of both the buyer and the seller in a real property transaction, the salespersons acting under the broker have the same fiduciary duty to the buyer and the seller as the broker. The buyer was prejudiced by the erroneous rulings, because the jury's findings of fact did not resolve the omitted issues concerning breach of fiduciary duty. Therefore, we reverse the judgment and remand for a new trial.

## FACTS

Defendant Chris Cortazzo is a salesperson for defendant Coldwell Banker Residential Brokerage Company (CB). In 2006, the owners of a residential property in Malibu engaged Cortazzo to sell their property. The building permit lists the total square footage of the property as 11,050 square feet, including a single family residence of 9,224 square feet, a guest house of 746 square feet, a garage of 1,080 square feet, and a basement of unspecified area.

Cortazzo listed the property for sale on a multiple listing service (MLS) in September 2006. The listing service provided Cortazzo with public record information for reference, which stated that the living area of the property was 9,434 square feet. The listing that Cortazzo created, however, stated the home "offers approximately 15,000

square feet of living areas." Cortazzo prepared a flier for the property which stated it "offers approximately 15,000 square feet of living areas."

In March 2007, a couple made an offer to purchase the property. They asked Cortazzo for verification of the living area square footage. Cortazzo provided a letter from the architect stating the size of the house under a current Malibu building department ordinance was approximately 15,000 square feet. Cortazzo suggested the couple hire a qualified specialist to verify the square footage. The couple requested the certificate of occupancy and the architectural plans, but no architectural plans were available. In the real estate transfer disclosure statement, Cortazzo noted from his visual inspection that adjacent parcels were vacant and subject to development. He repeated his advice to hire a qualified specialist to verify the square footage of the home, stating that the broker did not guarantee or warrant the square footage.

When the couple learned architectural plans were not available, they requested a six-day extension to inspect the property. The sellers refused to grant the extension and the couple cancelled the transaction at the end of March 2007. In July 2007, Cortazzo changed the MLS listing to state that the approximate square footage was "0/O.T.," by which he meant zero square feet and other comments.

Plaintiff Hiroshi Horiike was working with CB salesperson Chizuko Namba to locate a residential property to purchase. Namba saw Cortazzo's listing for the Malibu property and arranged for Cortazzo to show the property to Horiike on November 1, 2007. Cortazzo gave Horiike a copy of the flier stating the property had 15,000 square feet of living areas. Escrow opened on November 9, 2007. Cortazzo sent a copy of the building permit to Namba. Namba provided a copy of the permit to Horiike with other documents.

The parties to the transaction signed a confirmation of the real estate agency relationships as required by Civil Code section 2079.17. The document explained that CB, as the listing agent and the selling agent, was the agent of both the buyer and seller. Cortazzo signed the document as an associate licensee of the listing agent CB. Namba signed the document as an associate licensee of the selling agent CB.

Horiike also executed a form required under Civil Code section 2079.16 for the disclosure of three possible real estate agency relationships. First, the form explained the relationship of a seller's agent acting under a listing agreement with the seller. The seller's agent acts as an agent for the seller only and has a fiduciary duty in dealings with the seller. The seller's agent has obligations to both the buyer and the seller to exercise reasonable skill and care, as well as a duty of fair dealing and good faith, and a "duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties."

The second type of relationship, which is not at issue in this case, involves the obligations of an agent acting for the buyer only. An agent acting only for a buyer has a fiduciary duty in dealings with the buyer. A buyer's agent also has obligations to the buyer and seller to exercise reasonable care, deal fairly and in good faith, and disclose material facts.

The third relationship described was an agent representing both the seller and the buyer. "A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer." An agent in a dual agency situation has a fiduciary duty to both the seller and the buyer, as well as the duties to buyer and seller listed in the previous sections.

Horiike signed the disclosure form as the buyer and Cortazzo signed as an associate licensee for the agent CB. In the visual inspection disclosure that Cortazzo provided to Horiike, he noted adjacent vacant lots were subject to building development. He did not add a handwritten note of advice to hire a qualified specialist to verify the square footage of the home, as he had in the previous transaction. Horiike completed the property transaction.

In preparation for work on the property in 2009, Horiike reviewed the building permit. He asked Cortazzo to verify that the property had 15,000 square feet of living areas. Horiike's expert testified at trial that the living areas of the home totaled 11,964

square feet. The defense expert testified the home's living areas totaled 14,186 square feet.

## PROCEDURAL BACKGROUND

On November 23, 2010, Horiike filed a complaint against Cortazzo and CB for intentional and negligent misrepresentation, breach of fiduciary duty, unfair business practices in violation of Business and Professions Code section 17200, and false advertising in violation of Business and Professions Code section 17500. The parties agreed that the claims based on violations of the Business and Professions Code would be determined by the court following the jury trial.

After the presentation of Horiike's case to the jury, Cortazzo moved for nonsuit on the cause of action for breach of fiduciary duty against him. The trial court granted the motion on the ground that Cortazzo had no fiduciary duty to Horiike. Horiike stipulated that he was not seeking recovery for breach of fiduciary duty based on any action by Namba. Therefore, the court instructed the jury that in order to find CB liable for breach of fiduciary duty, the jury had to find some agent of CB other than Namba or Cortazzo had breached a fiduciary duty to Horiike. The court granted Horiike's request to submit an additional cause of action to the jury for intentional concealment against both defendants.

The jury returned a special verdict in favor of Cortazzo and CB. The jury found Cortazzo did not make a false representation of a material fact to Horiike, so there was no intentional misrepresentation. However, the jury made a contrary finding in considering the claim for negligent misrepresentation, finding that Cortazzo had made a false representation of material fact to Horiike. There was no liability for negligent misrepresentation, because the jury found Cortazzo honestly believed, and had reasonable grounds for believing, the representation was true when he made it. The jury found no concealment, because Cortazzo did not intentionally fail to disclose an important or

material fact that Horiike did not know and could not reasonably have discovered. Lastly, the jury found that CB did not breach its fiduciary duty to Horiike.

The trial court determined the jury's findings resolved the remaining claims in favor of Cortazzo and CB. Therefore, on October 30, 2012, the court entered judgment in favor of Cortazzo and CB. Horiike filed a motion for a new trial on the ground the verdict was internally inconsistent, which the court denied. Horiike filed a timely notice of appeal.

## DISCUSSION

### Standard of Review

"'A nonsuit in a jury case or a directed verdict may be granted only when disregarding conflicting evidence, giving to the plaintiffs' evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiffs' favor, it can be said that there is no evidence to support a jury verdict in their favor. [Citations.]' [Citation.]" (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 669.)

"In reviewing a grant of nonsuit, the appellate court evaluates the evidence in the light most favorable to the plaintiff. [Citation.] The judgment of nonsuit will be affirmed if a judgment for the defendant is required as a matter of law, after resolving all presumptions, inferences and doubts in favor of the plaintiff. [Citation.] The review of a grant of nonsuit is de novo. [Citation.]" (*Hernandez v. Amcord, Inc., supra,* 215 Cal.App.4th at p. 669.) "'The existence and scope of duty are legal questions for the court.' [Citations.]" (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 163.)

However, "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury . . . or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be

of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

**Duty of a Salesperson Acting for a Dual Agent**

Horiike contends that Cortazzo, as an associate licensee of CB, owed a fiduciary duty to him equivalent to the fiduciary duty owed by CB. We agree.

The duties of brokers and salespersons in real property transactions are regulated by a comprehensive statutory scheme. (Civ. Code, § 2079 et seq.) Under this scheme, an "agent" is a licensed real estate broker "under whose license a listing is executed or an offer to purchase is obtained." (*Id.*, § 2079.13, subd. (a).) An "associate licensee" is a licensed real estate broker or salesperson "who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee." (*Id.*, subd. (b).) "'Dual agent' means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction." (*Id.*, subd.(d).)

"The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions." (Civ. Code, § 2079.13, subd. (b).)

"[A] broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. [Citations.]" (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25.) "[A] dual agent has fiduciary duties to both the buyer and seller." (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 414.)

CB acted as the dual agent of the buyer and the seller in this case, as was confirmed on the disclosure forms provided to Horiike. The disclosure form explicitly

stated that a dual agent has a fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with either the seller or the buyer. (See *Assilzadeh v. California Federal Bank, supra*, 82 Cal.App.4th at p. 414.) Cortazzo executed the forms on behalf of CB as an associate licensee. Under Civil Code section 2079.13, subdivision (b), the duty that Cortazzo owed to any principal, or to any buyer who was not a principal, was equivalent to the duty owed to that party by CB. CB owed a fiduciary duty to Horiike, and therefore, Cortazzo owed a fiduciary duty to Horiike.

Miller & Starr explains: "When there is one broker, and there are different salespersons licensed under the same broker, each salesperson is an employee of the broker and their actions are the actions of the employing broker. . . . [¶] When one salesperson obtains the listing and represents the seller, and another salesperson employed by the same broker represents the buyer, they both act as employees of the same broker. That broker thereby becomes a dual agent representing both parties." (2 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 3:12, p. 68, fns. omitted.) Miller & Starr notes: "Salespersons commonly believe that there is no dual representation if one salesperson 'represents' one party to the transaction and another salesperson employed by the same broker 'represents' another party to the transaction. The real estate industry has sought to establish salespersons as 'independent contractors' for tax purposes (see § 3:18), and this concept has enhanced the misunderstanding of salespersons that they can deal independently in the transaction even though they are negotiating with a different salesperson employed by the same broker who is representing the other party to the transaction." (*Id.* at pp. 68-69.)

Cortazzo, as an associate licensee acting on behalf of CB, had the same fiduciary duty to Horiike as CB. The motion for nonsuit should have been denied and the cause of action against Cortazzo for breach of fiduciary duty submitted to the jury. The jury was also incorrectly instructed that CB could not be held liable for breach of fiduciary duty based on Cortazzo's actions.

Cortazzo and CB contend that Horiike cannot show prejudice as a result of the erroneous rulings, because the jury's findings on other claims resolve the claim for

breach of fiduciary duty in favor of the defense. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 107 [a plaintiff cannot show prejudice based on the elimination of a proper legal theory if the jury's verdict on a different theory negates an element of the omitted theory].) This is incorrect. The jury's findings that Cortazzo did not provide false information to Horiike, or provided false information that he reasonably believed to be true, and did not intentionally conceal information, does not satisfy his duty to Horiike as a fiduciary.

"'[A] broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. [Citations.] 'The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information.'" (*Assilzadeh v. California Federal Bank, supra*, 82 Cal.App.4th at pp. 414-415, quoting *Field v. Century 21 Klowden-Forness Realty, supra*, 63 Cal.App.4th at pp. 25-26.)

"A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. [Citations.] A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent. [Citation.]" (*Michel v. Palos Verdes Network Group, Inc.* (2007) 156 Cal.App.4th 756, 762.)

"'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' [Citation.] [¶] . . . Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud even

though there is no fraudulent intent.' [Citation.]" (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562.)

In this case, the jury's findings do not resolve whether Cortazzo breached his fiduciary duty to Horiike. A trier of fact could conclude that Cortazzo was aware of material information that he failed to provide Horiike, even though he did not have a fraudulent intent. Cortazzo knew the square footage of the property had been measured and reflected differently in different documents. When a potential purchaser sought to confirm the square footage, Cortazzo gave handwritten advice to have the square footage verified by a specialist. He subsequently changed the listing for the property to reflect that the square footage required explanation. He did not explain to Horiike that contradictory square footage measurements existed. A trier of fact could conclude that although Cortazzo did not intentionally conceal the information, Cortazzo breached his fiduciary duty by failing to communicate all of the material information he knew about the square footage. He did not even provide the handwritten advice given to other potential purchasers to hire a specialist to verify the square footage.

The jury's verdict did not necessarily decide the cause of action for breach of fiduciary duty based on Cortazzo's actions. The jury's findings are inconsistent on the threshold issue of whether Cortazzo made a false representation about the square footage of the living areas. Therefore, we must reverse the judgment and remand for a new trial.

## DISPOSITION

The judgment is reversed. Appellant Hiroshi Horiike is awarded his costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.